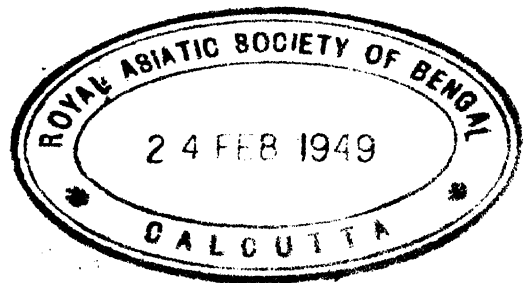


TRIAL BY JURY AND MISDIRECTION

BY

Sir MANMATHA N. MUKERJI, Kt., M. A., B. L.



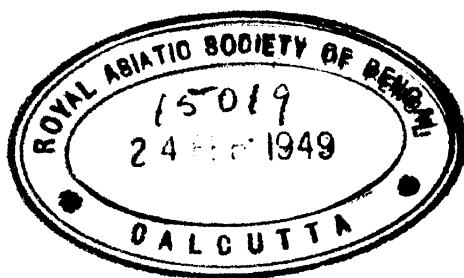
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PREFACE.

This book intends to place before its readers all such informations as are ordinarily required to be known in order to be able to deal satisfactorily with a criminal case which is to be or has been tried in a Court of Session or in a High Court, at any stage and in any capacity. A historical review of the growth and development of trial by Jury has also been included.

M. N. M.

January 18th, 1937.

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TRIAL BY JURY AND MISDIRECTION.

Part I—History.

CHAPTER I.

Development of the System of Trial by Jury in England.

The system of Trial by Jury is one of the remarkable features of English Jurisprudence. The distinctive characteristic of the system is that a certain body of men, chosen from the locality or the neighbourhood, where the cause of action or accusation arises, is interested to find out the truth or otherwise of the facts alleged and to report its finding or verdict to the Judge or presiding officer of the Court, who is to pronounce judgment and pass final order or sentence in accordance with that verdict. "The privilege that every Englishman enjoys of having his person and property so far secured, that no injury under pretence of law can be done to one or the other, but by the consent and approbation of twelve men of his own rank, is the greatest happiness that can belong to a subject, and the most valuable blessing that can attend society"¹.

How such a system came to be in existence in England has been accounted for differently by different writers. Thus, Serjeant Stephen says that the germ of this system was to be found in the old Scandinavian tribunals and was brought from there by the Normans who settled in England after the Conquest². That is also the opinion of Reeves³. Both these writers as well as Meyer⁴, Palgrave⁵ and Forsyth⁶ are of opinion that Trial by Jury, as it is at present understood, was unknown to the Anglo-Saxons. Blackstone, however, was of opinion that juries were in use amongst the earliest Saxon Colonies⁷. That is also the view of Turner⁸. Chief Commissioner Adam declares that in England it is of a tradition so high that nothing is known of its origin⁹. Sir John Hawles, Solicitor-General to King William IV., in his treatise "The Englishman's Right", published in 1764, states that Trials by Jury have been used so long that the best historians cannot date the original of the Institution; that Juries (the thing in effect and substance, though perhaps not just the number of twelve men) were in use among the Britons, the first inhabitants of England; that most certain it is that they were practised by the Saxons and subsequently continued by the Normans after the Conquest¹⁰. Some say that the system is derived from the Celtic tradition based on the

1. Pettingal—*An enquiry into use and practice of Juries*, (1769), P. 1.
2. *Commentaries*—III, 349.
3. *History of the English Law*—I, Ch. I; II, Ch. 2.
4. *The Origin and Progress of the Judicial Institutions of Europe*—II, Ch. 11.

5. *Rise and progress of English Commonwealth*,—I, 256.
6. *History of Trial by Jury*—P. 54.
7. *Commentaries*—III, 588.
8. *History of the Anglo-Saxons*—III, 223.
9. *Treatise on Trial by Jury in Civil Causes*, P. 5.
10. P. 5.

principles of Roman Law, and Dr. Péttingal believes that the English Jury system was derived from the *judices* of the Roman Law. Forsyth says, "I believe it to be capable almost of demonstration, that the English jury is of indigenous growth, and was not copied or borrowed from any of the tribunals that existed on the Continent"¹¹. He says further, "I cannot help feeling persuaded that the rise of the jury system may be traced as a gradual and natural sequence from the modes of trial in use amongst the Anglo-Saxons and Anglo-Normans, that is both before and after the Conquest"¹².

One thing is certain that the system of trial by Jury does not owe its origin to any Legislative enactment or to any Kingly order. It might have been confirmed, modified or regulated according to the exigencies of the times by such authorities in subsequent times, but the system—may be in a crude form—was there: Whenever, therefore, the Statute Law treats of juries, it is not to be understood as if the institution of juries took its origin and rise from thence¹³. The germ of it may be found in the instinct of self-preservation, natural to a settling community, in every part of the world, who had thrown off the nomadic habits of their forefathers and who would naturally wish to decide all disputes arising amongst themselves by the collective judgment of the members composing the community. Such a system cannot grow amongst wild tribes, who have no notion of rights of person or property and who live only by plunder, spoliation and devastation. As communities grow in size and numbers, as men's occupations and avocations become various and diverse, it becomes inconvenient as well as difficult to secure the attendance or co-operation of all the members of a community for a decision on a disputed matter. A limited number is then selected for the purpose. It is the Jury. When the dispute is between a member of one community with that of another, a Jury is chosen from the members of both communities to decide the dispute. As the scattered settlements become more and more linked together through increase in cultivated area and population, some arrangements, for selection of jurors, for their place of sitting and for presiding over their deliberations had to be made. And in this way, from diffusion to concentration and from concentration to centralization, the rustic Courts of old developed into the more finished judiciary of later times. And this is not all. The practice of having disputes decided by the whole people or a selected number of them developed into a custom; and a customary right to be judged by his equals,—or, as we now say, by his peers,—came in time to be the local or common law of the land. Moreover, with the growth of society, complexities of life arose, generating various kinds of liabilities and different kinds of offences, to distinguish which technical or expert knowledge was necessary; and the lay public, when asked to decide a particular matter, had often to seek the assistance of men possessing such expert knowledge. Thus came into existence a body of men known as lawyers, as distinguished from the lay public. As the decision on a particular matter might depend on questions of law as well as of fact, the Jury, in deciding it, would take the opinion of the lawyers. The function of the Jury thus ultimately came to be only to decide questions of facts.

11. *History of Trial by Jury*—P. 13.

12. *Ibid.*, P. 6.

13. Péttingal—*An enquiry into use and practice of Juries*, P. 123.

The growth or development of the Jury system is possible only when the liberties of the subject are not crushed down by the ruling power. Autocracy, foreign invasion or subjugation by conquest might cause its disappearance. It has been said that the Jury is the child of liberty and the consequence of a natural right that every man has to the safety of his person or the uninterrupted possession of his property. The right to be tried by equals or peers can only be asserted where the people have successfully withstood and checked the growth of arbitrary power in their Rulers or Kings. Where they failed, the system disappeared. "It does not seem to have been the growth of any one place or founded in the genius or peculiar mode of Government of any particular people, but to be the fair offspring of natural justice, and the result of humanity and tenderness in disposing of the life and property of individuals, which appeared even in the ancient civilized nations in proportion to the sense they had of liberty, equity and fortitude".¹⁴

When we read the ancient histories of Greece and Rome, we find that Trials by Jury flourished when the people regained or re-asserted their liberties. Thus, when Solon saved Athens from the tyranny of the oligarchy, he transferred the judicial powers which had previously been possessed by the *Archons* or the Magistrates to a popularly constituted Court named the *Heliaea*, which consisted of no less than six thousand jurors, and was sometimes subdivided into ten inferior Courts with six hundred jurors in each. Six of these Courts were for Civil and four for Criminal causes. Every citizen above thirty years of age, and not labouring under any legal disqualification, was eligible as a member or juror of the *Heliaea*. A small pay was allowed to the jurors during their attendance in Court. Each Court was presided over by an *Archon* or Magistrate. The Jury, or *dicast* as they were termed, were to enquire into the state of the cause before them by witnesses and other methods of coming at truth, and, after enquiry made and witnesses heard, to report their opinion and verdict to the president, who was to pronounce it. The several steps and circumstances attending this judicial proceeding were similar to the forms observed by the English Jury, with this exception that where the jurors could not agree the decision was by the majority.¹⁵ Similarly, the Romans, when they threw off the monarchical form of Government and introduced the commonwealth, entrusted the trial of causes to a body of men called *Judices*. These *Judices* or jurymen were chosen annually by lot from all ranks, and their number was 500, but it varied from time to time. At the trial of any criminal case, the presiding officer of the Court, called *Questor*, chose by ballot a certain number of jurors out of the general body. Generally the number was 81, but both sides had the right of challenging up to 15; ultimately the Jury empanelled and sworn to try the case came to be 51. They heard the witnesses and the arguments of Counsel and after retirement and due deliberation pronounced their verdict. They were judges both of law and fact. Their verdict or the verdict of the majority was reported to the presiding officer, the *Questor*, who pronounced it. Later on, however, when the Romans came under the Emperors, whose power gradually grew to be absolute, the institution of *Judices* under the Republic came by degrees to be discouraged and neglected and was at last laid aside.

14. Pettingal—*An enquiry into use and practice of Juries*—P. 1.

15. *Ibid*, Part II.

The usual mode of trials amongst the northern nations of Europe from the very earliest times, at least from the tenth century, was trial by a Jury of twelve. Of course the jurors decided both law and fact and awarded the sentence, but still they were not a class of men holding any permanent judicial office, but chosen, from time to time, from amongst the people to attend the Court and administer justice.¹⁶ In ancient Germany the judges consisted originally of all the freemen of the community, and every sentence, if not unanimous, was determined by a majority. Gradually the number of jurors came down to be seven.¹⁷ In the ancient civilization of Egypt there was a "Council of Thirty", chosen from the people, who used to transact, amongst others, judicial business. In India, the system of "Panchayet" is of very old tradition. This institution consisted of five persons nominated by both the disputing parties, each party nominating two; and the four so nominated appointing a fifth who may be said to correspond to the foreman. 'Panch' means five, and the belief was that the decision of five men was as good as the decision of Almighty and so could not err. Their business was not to weigh the evidence but to find out the truth. The evidence was not necessarily heard in public. It was a very useful institution and is being resorted to by the people even now.

Thus, in the annals of almost all nations, whose ancient histories have so far been traced, we find modes of trial very much akin to Jury trial and it would be fallacious to hold that one nation derived it from another. Rather, wherever we find that it has ceased to exist, we may conclude that some adverse circumstances banished it from the soil.

In tracing the development of the Jury system in England we must consider first how and when the English nation and the English language came into existence. Two thousand years ago the Britons were the only people in what is now called England and Wales. A race akin to them lived in Scotland and was known as Picts and Scots, and a similar race lived in Ireland. They were all members of the Celtic branch of the Aryans. The Romans under Julius Cæsar invaded England in 55 and 54 B. C., but they did not occupy it. They conquered the country and ruled over it for a period of about 300 years (A. D. 43—410). After that they withdrew. The Britons were then attacked by other people from the Continent. These were the Angles, Saxons and Jutes, who came to Britain to plunder the fields and cities which the Romans had made there. Tribe after tribe of them came, slaying the Britons, making them slaves or driving them back into the mountains of Wales (450-600 A. D.). They divided England at first into many kingdoms and fought a good deal amongst themselves, but ultimately the country came under the rule of one King, Egbert, in 827 A. D. When the Anglo-Saxons settled in England they used to live together in small bands wherever they found good soil and water. By the union of numbers of small settlements the English kingdoms were formed; and by the union of the several kingdoms one English kingdom was formed under Egbert. When Alfred the Great, the grandson of Egbert, was King of England (871-901 A. D.), he had to fight hard against bands of Danes, another race who came from Norway, Sweden

and Denmark to plunder Britain. Eventually these Danes or Northmen occupied some portions of England and settled there, and from 1016 to 1042 A. D. there were Danish Kings of England; and the chief of these was a wise, firm and just ruler named Canute. Canute was not only King of England but also of Denmark and Norway. As he could not always be in England, he made some of his followers Earls or rulers over parts of the country. This title has continued since his days. The last invasion of England was by the Normans. They were a people very much like the Danes and they settled down in Normandy, a part of France. William, Duke of Normandy, conquered England and became King both of England and Normandy in 1066 A. D. He kept the Saxon laws but he gave most of the conquered lands to his Norman nobles called Barons. Every one of these nobles and of the tenants who held lands under them took the oath of fealty or faithfulness to the King as Supreme Lord. Each of the smaller tenants took a similar oath to the lord from whom he held his lands. Thus the old Anglo-Saxon feudal lords ceased to exist and sank into a middle class. The old English free-holders became for a long time little better than serfs. The free farmers vanished and the farms were now held not as a free-hold, but as a feud or fief. This meant that in return for the right of tilling the land and having its produce, the holder was bound to do service to some lord or his superior. Norman-French was the language of the King's Court and of all the upper classes. The great Norman Barons held land both in England and in Normandy. The Kings held their Courts sometimes in England and sometimes in Normandy. This state of things continued till 1214 A. D., when King John (1199-1216 A. D.) was defeated by the French king who took possession of Normandy and his other territories in France. This loss of 'all the French possessions was good for England, for the Normans now considered England as their home; and it promoted the growth of English unity and English national feeling. A new language came to be formed from a mixture of Anglo-Saxon, Norman and French languages, which became the common language of England; and that is the present English language. It is said that if we compare English to a house, the nails and glue in the house are Saxon and the bricks Norman.¹⁸

Lord Macaulay says, ¹⁹—"Here commences the history of English nation, the history of the preceding events is the history of wrongs inflicted and sustained by various tribes, which indeed all dwelt on English ground, but which regarded each other with aversion, such as scarcely ever existed between communities separated by physical barriers...In no country has the enmity of race been carried further than in England. In no country has the enmity been more completely effaced. The stages of the process by which the hostile elements were melted down into one homogeneous mass are not accurately known to us...Then it was that the great English people was formed, that the national character began to exhibit those peculiarities which it has ever since retained, and that our fathers became emphatically islanders, islanders not merely in geographical position, but in their politics, their feelings and manners. Then first appeared with distinction that constitution which has even since, through all changes, preserved its identity...Then it was that the common

18. *Fraser's First History of England*, P. 25

19. *History of England*, I, p. 8,

law rose to the dignity of a science and rapidly became a not unworthy rival of the imperial jurisprudence....Then was formed that language, less musical indeed than the language of the South, but in force, in richness, in aptitude for all the highest purposes of the poet, the philosopher, and the orator, inferior to the tongue of Greece alone."

It was on the 15th June 1215 (i. e., after 150 years of Norman rule) that King John was compelled to grant the great Charter, known as the "Magna Charta", one of the clauses of which was "that no freeman was to be imprisoned, outlawed, punished or molested, except by the judgment of his equals or by the law of the land" (i. e., by the decision of a Jury, by Trial by Battle, or by Ordeal).

It is quite evident therefore that at that time Trial by Jury was in vogue, or had become the common law of the land. We have seen before that William the Conqueror kept the Saxon laws. So the system of Trial by Jury either existed before the Norman Conquest or was introduced by the Normans after the Conquest.

We have seen that the system of Trial by Jury is the child of liberty. Liberty is the outcome of security ; and there could be very little of security when contending tribes were coming to Britain, fighting amongst themselves and ravaging the country. We know very little of the judicial system, if any, of the Britons, before the Roman conquest. The only period of peace and security that Britain obtained might have been during the period of more than three hundred years of the Roman occupation. No doubt, amongst the Romans the *judices* or the Jury system prevailed, but this was during the period of the Republic and it gradually ceased to exist under the Emperors, as we have seen before. Britain came under the Romans during the rule of the Emperors and so it is improbable that a system, anything like that of the *judices*, was ever introduced in Britain under the Roman administration, as Dr. Pettingal wanted to suggest. Even if it was introduced, it did not and could not take root, for the Angles and Saxons, who came soon after the Romans left, made the Britons their slaves or drove them away and took possession of the soil.

The next question is whether the Anglo-Saxons brought it with them. So far as the researches of eminent scholars go, Jury system was very prevalent amongst the nations of Scandinavia in the 10th century, if not earlier. There is no evidence that such a system prevailed during the 5th or 6th Century when the Anglo-Saxons, who came from there, settled in England. In fact they were then no better than nomad tribes. No doubt, after they had settled there for some time and founded kingdoms, some sort of judiciary came to be established. But it is more probable that a system of rough and ready justice prevailed than a calm deliberation by a body of men : such as *Wergild*, *Fridborh* or *Frank-pledge*, *Compurgators* and *Ordeal*.

Wergild—A composition in money to be paid for personal injury done to another according to the value which the law set upon his life. If the offender refused to pay the legal compensation, he was exposed to the vengeance of the injured party and his friends.²⁰

20. Forsyth.—*History of Trial by Jury*, P. 56.

Fridborh or *Frank-pledge*—Whereby every member of a family or tithing became a pledge or surety to the other members. So if one of them committed an offence, the other members were to pay the *wergild*.²¹

Compurgators—When a person was charged with a debt or crime and he denied the charge on oath, then, if he could bring 12 persons who would say that he had not sworn falsely in denying the charge, he was acquitted. They were called *Compurgators*. They were like witnesses to character.²²

Ordeal—Where an accused was unable to adduce a sufficient number of compurgators, he was to undergo Ordeal. The Ordeal was of three kinds :—(1) the Ordeal of hot iron, in which the accused had to take up and carry for a certain distance a mass of hot iron of a pound weight ; (2) the Ordeal of hot water, in which he had to take out of a pitcher of boiling water a stone hanging by a string, at a depth equal to the length of his own hand ; (3) the *Corsnæd*, or the Ordeal of 'the accursed morsel', which consisted in making the accused person swallow a piece of bread, accompanied with a prayer that it might choke him if he were guilty,²³ and the idea being that if he was innocent he would come out of this ordeal healed up within a fixed time.

Some writers are of opinion that the Jury system was derived from the system of Compurgators. Forsyth, however, does not agree in this view.²⁴ What he says is this : "Compurgation was one mode of trial ; the jury was another ; each was distinct from the other, and both might and in fact did co-exist together" ;—an observation against which there is nothing to say, if we consider compurgators to be merely witnesses to character. But before whom and how was the offender brought for justice ? We find that as the Anglo-Saxon settlements increased and kingdoms began to form, the internal administration was as follows :—The kingdoms were divided into *shires*. Each shire was divided into districts called *hundreds*. Each hundred contained a number of *town-ships*. The head officer of a town-ship, known as *town-reeve*, called the grown up men of the town-ships to meet in the *town-moot*, where they settled matters which concerned the town-ship. Similarly the presiding officer of a hundred, known as *hundred-elder*, dealt with the business of the hundred in a meeting called the *hundred-moot*. The head of the shire was the *alderman* of *alderman* who was placed over it by the King and wise men of the Kingdom. The meeting of the wisemen of the Kingdom was known as *Witena-ge-mot*. Besides the alderman were the bishop and the King's representative, the *shire-reeve* or sheriff. The meeting of the men of the shire was called the *shire-moot*.

The laws were made by the *witena-ge-mot*. It was made up of the King and the members of his family, the aldermen, the archbishop and the bishops and the King's *thegns* i. e., his servants who were really nobles.

The shire-moot settled all quarrels. One mode of settling it was that if a man was accused of theft or murder and had got no relations to swear that he was innocent he was

21. Ibid, p. 60.

22. Ibid, p. 74.

23. Ibid, pp. 81, 82.

24. Ibid, p. 83.

put to the ordeal, and if he was not healed up in the course of a fixed time, he was held guilty and punished. The punishment usually consisted of a fine paid to the sufferer, or to the family of the slaughtered man and an extra fine was paid to the King"²⁵.

These meetings of the hundred-moots, the shire-moots etc., held by the Colonists might have been the source from which the later-day Jury system took its rise. The germ undoubtedly was to be found there. Besides, when Ethelred I, the elder brother and predecessor of King Alfred, was King of England, i. e., about the year 871 A. D., he ordered—"In every Hundred let there be a gemot (meeting or court), and let twelve ancient Freemen, together with the Lord or rather the Reeve (the chief officer amongst them), be sworn, that they will not condemn any person that is innocent, nor acquit any one that is guilty". Many writers interpret this as showing that the Jury system existed in the time of the Anglo-Saxons ²⁶.

All that can be said is that there was no clear indication of the Trial by Jury amongst the Anglo-Saxons. Forsyth says:—"As yet it had no visible existence, but the idea was implied in the requirement that disputed questions should be determined by the voice of sworn witnesses, taken from the neighbourhood, and deposing to the truth of what they had seen or heard"²⁷.

After the Conquest by the Normans in 1066 A. D., the right of trying the accused was given to the Barons, the Norman Nobles. The barons were great land-holders, the lands being given to them by the Norman Kings for their faithful services and to help the Kings in their wars. The barons often made the accused fight his accuser to see which of them was right. They thought God would help the right side and if the accused was innocent he would win. This was called Trial by Battle. This caused injustice in many cases and the people were dissatisfied. King Henry I (1100-1135 A. D.), wanted to curb the power of the barons. He ordered the shire-moots and the hundred-moots to meet regularly as before, which was a great check to the barons, because, as they were presided over by the King's officer the Sheriff, the nobles were prevented from getting into their hands the administration of justice. Henry I. also established the *Curia Regis* or the King's Law Court which tried all cases between the great nobles and other cases on appeal from the shire-moots. Henry II (1154-1189) further reformed the administration of justice in the shire-moots or county courts. In 1166 by the Assize of Clarendon, he began the practice of regularly sending two or more judges from the *Curia Regis* to sit in those courts. These judges were called *Justices in eyre* (i. e., justices on journey) and their journeys were arranged in regular circuits which underwent little change down to quite recent times. When the county courts met, 12 men from each hundred and 4 men from each town-ship presented to the judges such men as were notorious murderers or robbers or receivers of such. They were then ordered by the judge to be tried by the ordeal. This body of 16 men, who presented persons believed to be criminals was called a *Jury of Presentment*, and it was the origin of the modern Grand Jury system. It was called a

25. Ransome's *History of England*, P. 21.

26. See Hawles' "*The Englishman's Right*" (1764) P. 5 ; Pettingal's *An enquiry into*

use and practice of Juries, Pt. III ; *Contra* : Forsyth's *History of Trial by Jury*, P. 68.

27. Forsyth's *History of Trial by Jury*, P. 92.

Jury because its members were sworn *Jurato* to accuse truly. The number 16 was reduced to 12 in the reign of the next King, Richard I. As to the trial of an accused by a Jury of twelve, we find no provision in any laws up to the time when the next King, John, granted the Magna Charta in 1215; but as the Charter mentioned it, there can be no doubt that it existed then. There was another law of Henry II, the *Grand Assize*, which extended the Jury system to civil cases: It gave the claimants to the estates the opportunity of referring their claims to the decision of a Jury, as an alternative to the barbaric custom of Trial by Battle. Probably, as Forsyth says, the *Jury of Presentment*, in consequence of the oath which they took, united for a long time the functions of a Grand Jury to accuse and a Petit Jury to try the accused,²⁸ and the separation of the accusing from the trying Jury came to exist in the reign of Edward III.²⁹ (1327-1377 A. D.)

In 1215 A. D. Pope Innocent III. forbade the use of Ordeal. Partly on account of this and partly through other causes, it was replaced by trial by *Petty Jury*, but when and how is not exactly known. "The *Petty Jury* consisted of twelve men who were taken from the neighbourhood where the crime was committed, and were supposed to know the facts of the case. If they did not agree, others were added till twelve gave a verdict one way or the other. At a later date the additional jurymen only gave evidence before the original twelve, who gave the verdict on the evidence of the witnesses as is done at present. As the *Petty Jury* was a substitute for the Ordeal, the prisoner could not speak in his own defence and till modern times he could not call witnesses in his behalf; but it was assumed that he was innocent unless the Jury were certain that he was guilty".³⁰

We conclude this Chapter by quoting the observations, on this subject, of the eminent jurist Sir James Fitzjames Stephen in his book, "General view of the Criminal Law".

Summing up the procedural part of the history of the criminal law of England Sir James Fitzjames Stephen says³¹:—"Before the Conquest the system of Criminal Procedure was "essentially local. It consisted of courts in which it seems that the suitors were the judges, "and which were convened by and presided over by the earl, the sheriff, or in particular "places by other persons. The mode of accusation was by common report, or a sort of "judicial committee of the court. The mode of trial was by compurgation or by ordeal. At, "and for a considerable time after the Conquest, the system remained, but it was greatly "invigorated by the action of the Curia Regia and the King's justices, whose authority gradually "superseded that of the old County Courts. The Courts of the Justices of Assize were first "established, very nearly in their present form, by Henry II; and the Queen's Bench Division "of the High Court of Justice is of the same or very nearly the same antiquity, representing "as it does the Court of Queen's Bench, which represented the principal division of the "original Curia Regia. The procedure of these Courts was by means of the inquest which "was also a Norman invention. A new mode of trial was introduced by the Conqueror—

28. Forsyth's *History of Trial by Jury*, P. 198.

29. Ibid, P. 206

30. Ransome's *History of England* P. 71.

31. *General view of the Criminal Law*, 2nd. Edn., 1890. Pp. 52-53.

"namely, trial by battle, which was regulated private war. Under this system accusations were made by inquests, and for about one hundred and fifty years or more, the mode of trial continued to be by ordeal, or if the accuser was a private person by battle. When ordeals were disused, which was before the middle of the thirteenth century, petty juries were introduced, and they gradually became judges of the facts deposed to by witnesses, instead of official witnesses of the fact. Trial by jury has ever, since its full development was reached, continued to be the established mode of trying criminals. The attempt to supersede it by Star Chamber failed, and has never been renewed; but it has been, to a small extent, superseded in reference to the punishment of matters of comparatively trifling importance by the summary powers given to Magistrates."

The same learned jurist has traced the origin of Trial by Jury to the Inquest. The Inquest and the Curia Regia were the two great institutions that came into existence after the Conquest and formed the foundation of other institutions to which administration of justice in England owes much, if not all its advancement and superiority. Of the Curia Regia he says ³² :—"The King's Court or Curia Regia was at once a Parliament, a Supreme Court of Justice and a Supreme Board of Revenue and Administration..... It is enough to say that the Court of Queen's Bench, now the Queen's Bench Division of the High Court of Justice, and the Courts held before the Justices of the Assize, which to this day are the great criminal Courts of England, are directly descended from the Curia Regia. It is owing to their influence that the criminal law of England has always retained its uniformity, whatever other faults it may have had, and has almost invariably been administered to the satisfaction of the public even under the most trying circumstances, and that the criminal courts have had sufficient authority by their decisions to develop, with some assistance from a few writers of law books, or crude collection of names of offences, into the most complete body of jurisprudence in the world."

"The Inquest," says he, ³³ "unknown I believe before the Norman Conquest, was in the ultimate result quite as remarkable as the Curia Regia. It was simply an inquiry held before one or more persons appointed to make it, into facts which the King wished to know for the purposes of his government. These inquiries were taken before justices, of whom an indefinite number were attached to the King's Court, and who were employed, as occasion required, for services defined by Commissions issued from time to time. The inquests, by which the information recorded in Domesday Book was collected, supply the most striking and memorable illustration of the nature and working of the institution. Commissioners were sent all over England. The sheriffs and bailiffs brought before them people locally acquainted with the matters to be recorded. They gave their information upon oath, probably after making inquiries of the parties interested, and their return formed a record of all the matters on which the administration of the executive government and particularly the collection of the feudal and territorial revenue of the Crown depended."

32. *General view of the Criminal Law*, 2nd. Edn, 1890. P. 13.

33. *Ibid*, p. 14

"These inquests were the real origin of trial by jury, and the intermediate position of the members of the inquest between judges and witnesses explains the history of that mode of trial and its strong and weak points."

Tracing the development of the system he observes :—³⁴ "It would be difficult to trace out in full detail the process by which trial by jury, as we understand it, was developed from the old inquests, but the general nature of the process may be stated with great confidence. No perfectly distinct account can be given of the proceedings before a justice in eyre—³⁵ as they originally were, but it is clear that the first step was to call together the principal persons of the country and to require them to report upon the crimes which had been committed in the country since their last appearance. They would naturally present the persons who had been previously arrested or held to bail by the sheriffs, the constables, afterwards by the coroners, and at a later period still by justices of the peace, as well as those whom they knew or suspected by their own information. How the functions of the petty jury came in or who the petty jurors originally were is by no means clear. Whether the freemen and the reeve from the particular township in which a crime was committed were originally fined for it, or whether any sort of general panel was provided, and if so, how, are matters which cannot now be discovered, nor can I say what precise effect the accusation of a grand jury had in the very earliest times. It is also very difficult to ascertain what was the line between the functions of the grand and the petty jury, and how far the justices took part in their deliberations or enquired into the reasons they had for their verdicts. There is, however, abundant evidence ³⁶ to show that however their powers may have been exercised, jurors, both grand and petty, originally were, as grand jurors still are in theory, official witnesses, upon whose sworn reports the justices acted in trying crimes. It is probable that from the very first they were aided by actual witnesses of the facts on which their reports were based, and it is certain that as time went on they ceased to be expected to testify to matters within their own knowledge, and came to be judges of matters of fact deposed to in their presence and under the supervision of the justices..... There is abundant evidence to show *first*, that all juries held in the thirteenth century the position of official witnesses ; *secondly*, that they were closely examined by the justices who took the inquests as to their reasons for their accusations or verdicts ; and *thirdly*, that they were assisted in the discharge of their functions by witnesses, in the modern sense of the word, to particular

34. Ibid, p. 14.

35. 'Assizes' are the direct descendants of the *itinera* or *eyres* which were first reduced to a system, by no means unlike the circuits, in the time of Henry II. (Sir J. F. Stephen's *General view of the Criminal Law*, 2nd. Edn. 1890 p. 15.) For a history of the *eyres*, see his *History of the Criminal Law*, Vol. I, pp. 97-III).

36. In the Appeal Proceedings in the case of (Sir) Roger Casement the following appears :—

Mr. Justice Darling—Are you speaking of

the time before there were witnesses, when the jurors were the witnesses ?

Mr. Sullivan—Yes.

Mr. Justice Darling—Or of a time when the jurors were jurors, and witnesses could be summoned before them ?

Mr. Sullivan—I will take the time when the jurors were the persons who first presented and subsequently tried on their own presentment, they were the witnesses and the proof (See Trial of Roger Casement, edited by G. H. Knott. pp. 212-213).

"facts."³⁷ The change from the antique form of trial by jury to that which still exists amongst "us, in which the grand jury accuses on the evidence of witnesses heard in private and the "petty jury decides upon the accusation also on the evidence of witnesses, but under the "direction of the judge, was no doubt gradual, and there could be little interest in tracing out "the steps by which it came to pass.....The change was substantially complete in the sixteenth "century when we have the first report of an important trial by jury—that of Sir Nicholas "Throckmorton in a form presumably more or less authentic. The account given in the reign "of Queen Elizabeth by Sir Thomas Smith,³⁸ Secretary of State and Ambassador to France, of "criminal trials, shows that the ordinary course of criminal justice in his time was, so far as the "functions of the jury are concerned, substantially what it is now."

He summarizes³⁹ his conclusions in these words :—"After the Revolution, a decisive "victory having been won by one of the great parties of the State, the administration of criminal "justice was set upon a firm and dignified basis and so became decorous and humane ; and "as it was mainly left in the hands of private persons, between whom the judges were really "and substantially indifferent, the questions which were involved came to be fully and fairly "investigated, each party to the contest doing the best he could to establish his own view of "the case in which he was interested."

37. For details and authorities See Sir J. F. Stephen's *History of the Criminal Law*, Vol. I. pp. 251-272.

38. *Commonwealth of England*, Ch. XXV, 183-

201 ; Sir J. F. Stephen's *History of the Criminal Law* Vol. I. pp. 347-349.

39. Sir J. F. Stephen's *History of the Criminal Law*, Vol. I. pp. 425-427.

CHAPTER II.

General Features of the System.

Trial by Jury means more than the Jury merely and its duties. Besides the Jury, there are the Judge who presides, the contending parties and their witnesses and finally the advocates of the respective parties. "Each of these parties is indispensable to a trial, to say nothing of Sheriff and clerk, and other officers and appendages belonging to a Court. Each is a portion of the whole, and all must move together to reach a judicial result. Here is the law's mechanism; the wheels and cogs which perform their distinct and separate offices. But this is no inanimate machine which is now set in motion; no material contrivance of human ingenuity, working with wood or stone or iron, and for a material purpose. It is rather the delicate and profound adjustment of the subtle and imponderable forces of the human mind and soul; the perception, the reason, the judgment, the conscience—all called into action and all combined in the effort to reach those two grand moral ends,—truth and justice. All this gives dignity and seriousness to such a proceeding. So also is there something essentially picturesque and dramatic in every Trial by Jury. It is always a living panorama of human life and experience, which is enrolled in a trial in a Court of Justice; sometimes grotesque and ludicrous as any comedy; sometimes deep and awful as any tragedy"¹

The Judge must be well versed in law, for it is his duty to decide promptly all questions of law as they arise in the course of the trial, and a Jury trial is no place for a judge to doubt, and read law and ponder.

The Jury are a body of lay men selected by lot to ascertain under the guidance of a judge, the truth in questions of fact arising either in a civil litigation or in a criminal process. They are generally twelve in number and their verdict, as a general rule, must be unanimous. Their province is strictly limited to questions of fact, and within that province they are still further restricted to the exclusive consideration of matters that have been proved by evidence in the course of the trial. They must submit to the direction of the judge as to any rule or principle of law that may be applicable to the case; and even in deliberating on facts they receive, although they need not be bound by, the directions of the judge as to the weight, value and materiality of the evidence submitted to them. Further, according to the general practice they are selected from the inhabitants of the locality, whether county or city, within which the cause of action has arisen, or the crime has been committed, so that they bring to the discharge of their duties a certain amount of local knowledge, an element in the institution which is by no means to be ignored.²

1. Donovan—*Modern Jury trials*—P. 171.

2. Prof. Edmund Robertson, LL. D., M. P., Pro-

fessor of Roman Law, University College, London, in *Encyclopædia Britannica*, Vol. XIII, under heading "Jury".

In England, the adjustment of property rights is left for the most part to the Judge, and ordinary mercantile cases too are dealt with without the aid of Jury ; but the aid of a Jury is resorted to in cases where damages have to be assessed for wrongs which affect the person, family or reputation of the plaintiff. In modern criminal practice of England several forms of Jury are in use : the Coroner's Jury consisting of twelve men to enquire into cases of sudden, accidental or suspicious deaths ; the Grand Jury, consisting of not less than twelve and not more than twenty-three men selected from the whole county, to consider the indictments to be preferred, and who after hearing the witnesses for the prosecution 'ignore' the indictment and their foreman then *indorses* it with the words 'no true bill', if the evidence is, in their opinion, insufficient ; and if they find that there is a case which the accused has to answer they find 'a true bill', so that the accused is then arraigned before a Petty Jury ; the Petty Jury, consisting of twelve men who enquire into the guilt of the accused.³

The following procedure is then generally observed. When the presiding Judge has taken his seat on the bench, the prisoner, against whom a true bill of indictment has been found by the Grand Jury, is called to the bar ; then the indictment is read to him and he is asked whether he pleads guilty or not. If the prisoner pleads 'not guilty', and puts himself upon the county i. e. claims to be tried, an officer of the Court calls the names of the jurors who have been summoned previously. Both sides have the right to challenge or to take exception to the selection of particular jurors. Challenges are of two kinds : (1) peremptory, made to the polls without reason assigned ; and (2) challenges for cause, which may be to the array or polls for some definite reason assigned and proved. The number of peremptory challenges to which either party is entitled is generally limited to a certain definite number. When the twelve petty jurors are ultimately chosen, they are sworn. The Counsel for the prosecution then opens the case to the Jury, stating the leading facts upon which the prosecution rely. The evidence of the witnesses for the prosecution are next taken and thereafter the evidence of the defence witnesses, if any. Arguments of Counsel on both sides are then heard, after which the Judge sums up the case, usually directing the Jury as to the law applicable, and may go through and comment on evidence given, and may even comment on the absence of evidence which might have been given. But a summing up is not so essential a part of the trial when the facts are clear and the law simple, that the Court of Criminal Appeal will necessarily quash a conviction when there has been no summing up. The facts must be left to the Jury to decide and the Judge must not usurp their function, but he is entitled

3. By statute 6 Geo IV C. 50 the Sheriff is now obliged only to return for the trial of any issue, whether civil or criminal, twelve good and lawful men of the body of his county qualified according to law. Juries are spoken of as "Grand" and "Petty", "Special" and "Common". "These classifications again are not mutually exclusive, for "Grand and Petty Juries [except at county "assizes] are summoned from the same jurors'

"books, and jurors marked as special therein are "liable to serve on common juries. The distinction between Grand and Petty has, generally "speaking, reference to different functions discharged in dealing in indictable offences, while "special jurors are distinguished by mark in the "jury lists as possessing particular qualifications "and, when serving as such, may receive a "special fee".—Halsbury's *Law of England*. Vol. 18, *Jury*, Para 559.

to express his opinion strongly in a proper case provided he leaves the issue to the Jury. It now becomes the duty of the Jury to return their verdict. It must be unanimous. If the Jury are unable to agree upon their verdict without retiring from their box, they withdraw to a place appointed for that purpose. There was an old rule against allowing them food, drink or fire until they agreed, but it was abolished in 1870 and they may now have fire and reasonable refreshment at their own expense. If the Jury cannot come to an unanimous verdict, they are discharged. The discharge of the Jury is not equivalent to a verdict of acquittal, and the prisoner can be remanded for a fresh trial. If the Jury unanimously find the prisoner 'guilty' the Judge pronounces the sentence. If the verdict be 'not guilty', the Judge acquits the prisoner.

The Criminal Appeal Act, 1907 (7 Edw. VII. C. 23), has abolished writs of error and the jurisdiction and practice of the King's Bench Division as to the grant of new trials in criminal cases, and has substituted a procedure by appeal on questions of law or fact or of mixed law and fact, or as to the legality or propriety of the sentence imposed. It makes no provisions for appeal in cases of acquittal.

It is not the intention of this work to present to the reader the various details of a Trial by Jury under the English system or the pleadings and practice relating thereto⁴. And a comparative study of the systems as prevalent in England and other countries obviously falls within the scope of a far more ambitious venture. It may not, however, be out of place to state here a few of the more salient points in which the English system, as a system, differs from what obtains in some of the other countries.

There are no Grand Juries in Scotland, except in cases of high treason where the law is similar to that of England. In all other criminal cases in that country forty-five jurors are summoned of whom fifteen are chosen by lot to try the case, and the verdict of a majority is sufficient.

The authority of the Grand Jury in Ireland is a survival of a very ancient power dating from Anglo-Norman times, and to whom are entrusted not only the ordinary criminal business preformed by the Grand Jury in England, but also the entire local government of the country, county by county⁵. The jury laws in Ireland under normal conditions are substantially the same as in England. The laws in the two countries in this respect were precisely similar until 1871 when the empanelling and summoning of jurors was made the subject of more stringent provisions in Ireland⁶.

In France the Jury system of trial in criminal cases was established in 1791 and it was retained in the Code Napoleon, promulgated in 1805. There is, however, no Grand Jury in France. The Jury is composed of twelve men and they can find their verdict by a majority.

4. For these reference may be made to Archbold's Criminal Pleading, Evidence and Practice; also to Sir J. F. Stephen's Digest of Criminal Procedure.

5. These laws, customs and traditions of 700 years

were summed up in 1836 by the Irish Grand Jury Act, 6 & 7 William IV Chap. 116.

6. For this and later enactments see Huband on *The Grand Jury, etc., in Ireland*.

In Germany, in the provinces bordering on the Rhine, such as Bavaria &c, the Jury system in criminal cases was introduced in 1798, while in the rest it was introduced in 1849. The Jury is composed of twelve men and they can give a verdict by a majority. In case of an unanimous verdict of "not guilty", the Court may annul the verdict and order a fresh trial. But if the same verdict is returned a second time it is final. In 1851 political offences were withdrawn from the cognizance of juries.

In Belgium it was introduced in 1830, when that country separated from Holland. It is based on the provisions of the Napoleonic Code.

In Holland the jury system does not exist.

According to the Norwegian Law of Criminal Procedure of the 1st July 1887 the System of Trial by Jury obtains in criminal cases, tried by a "*Lugmansrett*." These Courts are Courts of first instance in criminal cases of a more serious nature and Courts of appeal in minor cases, tried by District or Magistrate's Courts. The number of jurors is ten. A majority of at least seven jurors is required for a verdict of 'guilty'.

The system of Trial by Jury in Spain prevails only in criminal cases and not in civil; the trial closes with the verdict of the majority.

The system of Trial by Jury in civil, commercial or criminal cases, does not obtain in Italy. For deciding gravest crimes, the College of Justice is formed, partly of magistrates and partly of citizens.

In Denmark juries are compulsory in certain criminal cases, especially in cases which may involve capital punishment or penal servitude for 8 years or more, in cases concerning infanticide and criminal abortion, and in such cases as concern political misdemeanours. Jury cases are always tried before the "*Landsret*" and the Jury decides the question whether the accused is guilty or not guilty, and if there is reason for exemption from punishment or reduction of punishment. To the questions put before them by the Court they have to reply simply "Yes" or "No". If the verdict is 'not guilty', the case is dismissed, but in the contrary event the Court may demand a fresh trial.

In Greece it was introduced in 1834, in Portugal in 1837 and in Geneva in 1844. The number of jurors required varies in the different countries, but in all the verdict may be by the majority.

By none of the Continental nations Trial by Jury has been adopted in civil cases.

The British Colonies framed their Jury laws, for the most part, on the English model.

In the United States, English principles have been adopted with rare variations and the Trial by Jury is now a part of the constitution in most of the States. If the right to be tried by a Jury is deemed to be of immense value in Britain and among the dearest rights of the

7. For a general and comparative view of English and French Criminal Procedure, See Sir J. F.

Stephen's History of the Criminal Law of England Vol. I Chap. XV.

people, it is quite as dear and is not less regarded as of importance in America where the right is secured by the constitution of almost all the States of the Union, not only in criminal cases but also in all civil cases of importance where the amount in controversy is of any considerable value. Speaking of the system as in vogue in the United States, it has been said.⁸

*“There are some States in which the jurors are empowered to decide questions of law in criminal cases, and in some the Judge is forbidden to charge the Jury on the facts. “A verdict can be returned only on the unanimous vote of a Jury; and, with a view to “securing impartiality, each juror is required to swear that he is free from any preconceived “opinion as to the case on trial, and has no information calculated to influence his decision. “The law permits the challenging of individual jurors, both peremptory and for cause; and “this right has frequently been grossly abused, for the purpose of delaying justice, as for example, on the trial of the murderers of Dr. Cronin at Chicago (1889).

Speaking of India Sir James Fitzjames Stephen has said⁹ :—

“The Criminal Law of England, like every other important branch of the law, connects “itself with other systems....It has been the parent of other systems, one of which at least—the “Criminal Law of India—is on its own account a topic of great interest, whilst it becomes “doubly interesting when it is regarded, as it ought to be, a rationalized version of the system “from which it was taken.”

8. Chambers' Encyclopaedia, Vol. VI under heading 'JURY'

9. *History of the Criminal Law of England*, Preface.



CHAPTER III.

The Merits and Demerits of the System.

The strong adherence to the system in almost all the civilized countries of the world, especially in Britain and in America, after the experience of Centuries, is a proof positive of its efficacy as a security of right and a redress of wrong. In all the fluctuations of public opinion, regard for the system has always remained untouched and unabated and it has always and everywhere been spoken of as the palladium of public rights and liberties. No system which has the human element in it is perfect, and this system too has its defects. Of all articles in which its demerits have been discussed none is so comprehensive as the one written years ago by a German civilian,¹ a continental jurist with obviously no particular bias for the Emgland system. In that article the points of disadvantage stressed on are the following :—

“How far does the trial by jury satisfy the demands which are made of criminal jurisdiction ? How far is a certain determination of guilt or innocence to be expected of it ?

1. Can we believe the jurymen, who are accustomed to move only in the circle of common intercourse, can we believe them possessed of sufficient sagacity to look through the most complicated relations, which often occur in criminal trials, permitting neither aversion nor predilection to influence his verdict² ? Certainly not. But to attempt to abolish the evil by means of permanent jurors, who should acquire ability by practice would be to destroy the essential character of juries. Add to this that in the oral proceedings in the presence of the jurors, every means is afforded for the operation of sophistry, and the excitement of the passions, and that the various grounds of defence or accusations, often infinitely numerous, can in no wise be fairly examined and compared with each other—a process possible only when the judge forms his opinion from written documents³. In every case the last impression of a jury will be the decisive one. The charges by which, after the determination of the debates, the presiding judge, versed in the law, seeks to guide the deliberations of the jury and aid their untaught judgment, may contribute, indeed, to remove this and other deficiencies remarked below, but the effect of it is very inconsistent with jury trials ; for it makes him, in most cases, master of the judgment. One may generally foretell, in England, the verdict of the jury from the charge of the judge.

1. Translated from the German Conversation Lexicon. The entire article is quoted in the Popular Encyclopædia Vol. VII under heading 'JURY'

2. Cf. the readiness of jurors in this country, shown even now at times to convict on a charge of dacoity.

3. Often noticed in this country in complicated cases of embezzlement, falsification of accounts and the like and also in cases in which a large number of accused persons have to be dealt with separately in regard to acts extending over a large period or a large area.

2. Experience confirms it, and it lies in the nature of things, that the jury regularly hesitate, even against their conviction, to give a verdict of guilty, when it exposes the party to a punishment, in the public opinion, more severe than just⁴. To common penetration, it is extremely difficult to separate the fact from its legal consequences. This evil is seen to be in some degree necessary, especially in England, where the Criminal Code has not kept pace with the times, and a very slight theft is punished with the halter.

3. The question of guilt or innocence is not one of pure fact, but also a legal question, and presupposes, in every case, a knowledge of criminal law to be able to say whether any one has committed a violent robbery, which the accuser asserts, and, secondly, whether this act had those characteristics which the laws require to constitute the crime. But if, to remedy this evil, the jury should be restricted to the question whether a certain act has been committed or not, its object would be destroyed, and the authority to which is committed the decision of the point of law would be left to its free will, since it might make that act any crime it pleased. In England, recourse has been had to the dangerous practice of allowing the jury, when they find the accusation in a legal view but partially founded, or regard the crime committed as less heinous than the one charged, to give a verdict partly of acquittal, partly of condemnation, such as guilty of Manslaughter, but not of Murder. If the jury agrees on the point of fact, but cannot remove their doubts respecting its legal character they have to leave the decision to the judge. But will not the jury trust to their penetration more than is just? Does not the presiding Judge become absolute? Some might, indeed, be inclined to make it a decided advantage of juries, that the accused is tried by judges, who are his equals, and from whom, it would seem, may be expected a juster decision, more conformable to his peculiar situation than from others. But, in the first place, the poorer classes of people who, above all others fill the annals of criminal trials, must be excluded from the jury by reason of their want of information and comparatively small interest in the public welfare, by which means that equality is, in most cases, destroyed (thus, in England, to be a juror a person must have a certain income; the same is the case in France where attention is also paid to particular circumstances of rent); so that from the infinite gradations and varieties of property, education, opinions, and innumerable outward circumstances, instead of full equality, the greatest inequality often subsists between the jurors and the accused.

To this criticism the following answer has been given by an American jurist⁵ :—

'In the first place it is not necessary to contend that, *as an instrument of public or "private justice, it is an institution absolutely perfect*; that it is incapable of abuse; or that it never occasions error. That would be to require of it what belongs to no human institution whatsoever. Every work of man is, by its very nature,

4. At times also noticeable in cases involving communal questions. Also the reluctance on the part of jurors to convict on capital charges.

5. See Popular Encyclopædia Vol. VII under heading 'JURY'

imperfect. Every form of government involves some inconveniences and errors and abuses. Every effort to administer justice must necessarily fall short of perfect correctness, from defects of evidence, from infirmity of judges, from the wrong biases of human opinion, from errors in reasoning, from ignorance and passion and prejudice, independently of all intentional wrong or corrupt motive or malice or dishonesty or deliberate baseness. The only question is, what, on the whole, is the best means of administering justice, taking human nature as it is and human infirmity as it must ever operate. If crimes are to be tried and punished, if rights are to be enforced and wrongs redressed by judicial tribunals, what is the best structure of the institution for the purpose of trial and decision?

There seems to be but a narrow circle of means, out of which the choice is to be made. Shall the tribunal be composed of executive officers of the government, or of judges appointed by the government for each case, or of judges holding their offices permanently and independently of the government? Or, shall the tribunal be composed of jurors chosen at large, *pro hac vice*, or chosen permanently for that duty, without any previous qualifications of legal experience, learning or superior ability? And if so, by whom and in what number, shall they be chosen? Or, shall the tribunal be of a mixed character, composed of judges learned in the law, permanent in rank and station, and of juries selected for the occasion in an impartial manner, and the trial be had before judges expounding the law, and the juries deciding the facts? In cases of crimes, the object is to protect the innocent and to punish the guilty. Where does the danger chiefly arise? In political accusations, the government not only is a party but has a strong motive to produce a conviction. In other cases, it may not have so strong a motive, but it may be subject to influences of an equally fatal character. If the King or other executive, or officers selected by him for that purpose, *pro hac vice*, are to decide upon the guilt or innocence of the party according to their own discretion and such proofs as are satisfactory to themselves, there is no security whatsoever against unjust convictions. The decision will be arbitrary and according to the will of the prince or his favourites or according to State policy, or perhaps public prejudice actuated by resentment. If the trial be by judges solely appointed by the government and holding their offices permanently there may be danger arising from other and different sources, from their political opinions, from their state interests, from their irresponsibility to public opinion, and from influences of character and profession, which insensibly warp the judgment. If the trial be by permanent jurors, there will be still greater dangers from their want of proper learning, and general weight of character, added to the other objections. So that any of the proposed substitutes does not furnish more safety or certainty in the administration of criminal justice than that of a trial by jury.

"On the other hand, trial by jury, as known to the common law, affords some checks upon arbitrary power and enlists many just feelings and reasonable guards against oppression.

"1. The jurors are selected from the mass of intelligent citizens, of suitable qualifications, and of the same rank, and having the same general interest, as the accused. They are not permanently employed, and have no common connexion with each other, and no habits of fixed co-operation. They are, or may be strangers to each other, and to the accused,

until the moment they are empanelled. They are subject to no reasonable exception, either in point of character or influence, for that would exclude them at the will of the accused. They are subject to the same laws, and are liable to the same prosecution as the party on trial, and therefore have a natural tendency to sympathise with him.

"2. The trial is had in open court, before judges who hold their offices permanently, and who are bound to administer the law, and to give their opinions publicly to the jury. From the moment they are empanelled they are excluded from all intercourse with every person except what takes place in open court ; and their subsequent deliberations are private and secret.

"3. They are under oath to decide the case upon the evidence given in open court ; so that the court, the counsel and the by-standers have a perfect knowledge of every part of it. Thus the whole public become the ultimate judges of the sincerity and justice of their verdict.

"4. If they find a verdict against the party and there has been any error of law or fact, or any misconduct in the jury the court will grant a new trial ; but if they acquit him there can be no new trial, for the law will not allow a man to be twice put on trial for the same offence, and thus his life, liberty or limb be put in jeopardy.

"Here we see the humanity of the common law, which leans in favour of the accused, and disables the government, from practising oppression upon any citizen by successive vindictive prosecutions.

"5. Again, if the evidence is doubtful the party is entitled to an acquittal, and the court will so direct the jury ; for the common law will not tolerate that any man should be punished unless there be satisfactory proof of guilt to the minds of twelve of his peers or equals.

"6. It has been said that the facts are often complicated, and the guilt is compounded partly of facts and partly of law. This is true ; but here again the wisdom of the common law has provided that the judges will state to the jury what the law is, as applicable to the various postures of the facts as they may find them. They are also generally assisted by the arguments of the counsel on each side, in arranging and comparing the facts ; and the judge, in his summing up of the evidence, brings the whole in review, and points out to them the bearings of every part, and strips off the false glosses, if any, which have been made by counsel. But he still leaves them to decide upon it according to their own conscientious belief of it.

"7. It is said that the arguments of counsel may deceive them and blind them to the truth. But the answer is that they have an equal opportunity to hear the opposite side, and that generally the judges assist them when there is any attempt to misstate the evidence, by referring to their own notes of it, as given in open Court. And from long habits and experience in human life, jurymen learn to disregard the mere efforts of eloquence, and, under a sense of their religious and social obligations, consult the real truth and justice of the case. Would there be more security if no counsel were allowed ? No person will say so.

"8. It is also said that the judges may have an undue influence with the jury. This is certainly possible and has actually happened in corrupt times. In the case of Chief

Justice Jeffreys,* referred to in the preceding part of this article,⁶ it should be remembered that he held his office during the pleasure of the Crown, and not as the judges of England now hold, during good behaviour, or life.....It is well known that such is the jealousy of juries in this particular that any undue interference or solicitude for conviction, exhibited on the part of a judge, would destroy his influence and produce an opposite verdict. It is his supposed impartiality that gives weight to his opinion ; and the jury know that they have a right to disregard it if they please.

"9. It is said that juries may be influenced by improper motives, and sometimes disregard the law and give a false verdict. This is possible, and, indeed, has probably sometimes happened. But the occasions are rare ; and where there is a sort of suspicion of that sort, it always injures the character of the jurymen and subjects them to public scorn and odium. Generally, juries are scrupulous in respecting the law, because it is the only protection of their own rights. Where the law is very harsh and the punishment is disproportionate to the offence, they have sometimes shown a repugnancy to convict ; but they rarely have acquitted the party, unless there were circumstances of great doubt or of great mitigation ; and if their conduct in such cases is not strictly justifiable, it is generally not such as produces any reproach, either from the Court or from the public. These occasions, however, are rare, and constitute exceptions of no great moment in the general administration of justice.

"10. It is not true, as is sometimes supposed, that juries are ready to convict on slight proofs or insufficient evidence. Our law declares, on the contrary, that in such cases they ought to acquit the party, and it is always laid down to the jury by the Court. Indeed, the judges, in this respect, always act as counsel for the prisoner, and give their advice to the jury, in respect to every reasonable doubt in the evidence. There are so many checks upon juries, in cases of this sort, that it can scarcely happen, that an unjust conviction, at least by the improper bias of the jury, can take place. If there be any error it is usually on the side of mercy.

"11. It is objected that the jury sometimes find the party guilty of a part and not of the whole offence, as of Manslaughter when he is accused of Murder. Certainly the jury do so, and for the best reason that the law requires it. A jury ought not to find a man guilty of the whole of the charge unless it is wholly proved".

"12. It is also objected that juries often favour criminals. But this is not generally true, except to the extent that the law favours them. There may be cases of a popular cast, or of an odious nature where juries have occasionally shown improper bias for the accused ; but this objection applies to all tribunals, and is founded on human infirmity generally. Juries do not, even in cases of this sort, often depart from their duty ; and the exceptions are so few, that they are seldom felt or urged in free governments.

"13. But an objection, the most pressed by these who are not practically acquainted with the trial by jury, is that unanimity is required in pronouncing a verdict or condemnation.

It is true that no verdict can be received in England which has not the assent of all the twelve jurors ; and there are no means of compelling an assent ; and yet practically speaking, few cases of disagreement occur, except where there is a solid foundation for real doubts and difficulties..... No practical evil has as yet been felt from the rule. And it is no small recommendation of it that it gives a satisfaction and confidence to the public mind, in England and America, that the decision of a mere majority could scarcely ever give."

In the Westminster Review for April 1872. there was an article against the Jury System, some extracts from which are quoted below :—

"In Dublin, the jury system, in the trial of Kelly for the murder of Talbot, appeared in a "highly unfavourable light ; resulting in an acquittal, in the face of evidence, on the charge of "an act which the Nationalist press and other known partisans of the prisoner, so far from "indignantly denying, claimed for him as a deed of patriotism and righteous vengeance. "The sentiment that killing was no murder in the case of a police spy was an influential one "with the Irish jury as a like sentiment in the case of a Prussian soldier was influential in "dictating one of the most shameful decisions of a French tribunal. Many have been prompted "in consequence to raise the enquiry whether jury trial is any benefit to the people of Ireland. "But the question may be carried far deeper ; it is time we should revise at home, as well as "abroad, our popular panegyrics on the Palladium of British liberty. Priding ourselves, and "with good reason, on our administration of justice as one of the truest glories of our country, "we overlook the numerous and grave defects inherent in one branch of its procedure".

"The principle that a tribunal ought to be composed of the prisoner's equals strikes us "as being (at least in modern times) *prima facie* unreasonable. If the sole object of "administering justice were to provide every means of escape for a prisoner accused of even "the gravest offences, we could see a direct purpose in the provision which substantially "enacts that the judges shall be of the class most likely to sympathize with him and look with "lenient eye on his guilt. It is palpably framed as a safeguard to the accused in a state of "society where class-feeling is rampant, and mutual hostilities have engendered in every man "that has power over the security or life of his fellow in a different grade the sentiment of the "wolf in the fable—"I know that the whole breed of you hate me, and therefore I am determin-"ed to have my revenge".

"We do not, question that there is an element of utility in all institutions which, like "trial by jury, involve public co-operation for public purposes. But we must remember that "the benefit is here confined to a comparatively small number out of the whole population, and "even to them occurs only at intervals. Our jury trials can exert no such wide effect, either "in the way of intellectual exercise or of training to social duties, as the large *dicasteries* exerted "on the quick-witted people of Athens".

"But even were the benefit greater, are we justified in imposing for the general good so "heavy a burden on the individual citizen as his compulsory absence for an indefinite period "from the employment by which he gains his livelihood ? We are accustomed on other "subjects to demand very clear proof of necessity before requiring so serious a sacrifice, We

"do not expect our ministers of State, our judges, or our generals, even though their service is voluntary, to act without a just remuneration. We have abandoned the impressment of seamen, which really, when examined, presents much similarity to the compulsory and ill-paid work of jurors. If we must have sailors for our Navy, we recognise our duty to pay them sufficiently well to make it worth their while to serve us voluntarily. The payment of jurors in the same way from the State funds would be a grievous charge on the tax-payer. Payment by the litigants (at the rate of a guinea a day for each juror) was lately tried for a few months, but it was soon found necessary to abolish a system so incompatible with cheap justice. If then we feel it unjust that men, to whom their time is money—perhaps bread—should be subjected to a tax at once partial in its application, utterly uncertain in its amount, and dictated by no real necessity, we have a simple remedy in the removal of the jury system *in toto*."

"We are told that in India, where juries are composed of five members, a proverb asserts that 'where the five are, there is God'; but without an apotheosis of our English jury, it is no doubt a frequent opinion that where the twelve are, there is good sense, integrity, patience, impartiality. So desirable is it that the nation should feel a reliance on the excellence of its tribunals, and that their awards should not be received with sullen murmurings of 'injustice' or 'prejudice', that this popularity so long as it exists is a consideration of much moment in favour of trial by jury, though no reason for ceasing to urge a recognition of the superior merits of a different system."

"But what are the positive charges to be brought against the system of jury trial? Some indeed have been inevitably implicated in the discussion of the real or supposed advantages. Examining first its suitability for the occurrences of every-day life, in a time when the clamour of political disputes is not heard, and the apprehension of any interference from the ruling power is out of the question, we are forced to the conviction that a jury possesses far less ability than would be displayed by a trained judge."

"On a recent occasion, when a counsel, arguing that certain evidence against a railway company should have been submitted to the jury, remarked that he was sure not a jury could be called in England but would give it great weight, one of the bench intimated that not a jury could be called in England but would take every opportunity of finding a verdict against such a company. Again, in districts where religious animosities run to a height, an upright judge would seek to close his mind entirely against dictates of sectarianism, where a jury yields to them, probably with self-approval. We are told that in Ireland when a jury is summoned to try a violation of the Party Processions Act, or any offence involving the passions of Romanists and Protestants, the issue can in general be predicted as soon as it is known of whom the tribunal is composed, Romanist will acquit Romanist and condemn Protestant—Protestant will treat Romanist with equal justice; if the jury be divided in religion they will also be divided in their judgment, and the disciples of parson and of priest can unite in no verdict⁷ Mr. Taylor in his standard treatise on evidence, commenting on the frequent utility of producing in Court the

7. A remark, very applicable to places in India, where communal tension prevails,

"instruments or other objects to be identified, observes that such evidence must be used with 'caution. 'The minds of jurymen', he proceeds, 'especially in the remote provinces, are 'grievously open to prejudices ; and the production of a bloody knife, a bludgeon, or a burnt 'piece of rag, may sometimes, by exciting the passions or enlisting the sympathies of the jury, 'lead them to overlook the necessity of proving in what manner these articles are connected 'with the criminal or the crime, and they consequently run no slight risk of arriving at 'conclusions which, for want of some link in the evidence, are by no means warranted by the 'facts proved'".

"In the disorderly districts of Ireland, it has been found necessary to dispense, or at least "to make provision for dispensing, with jury trial, the criminal at the bar being in the passions "and antipathies of a type of his neighbours by whom he would ordinarily have been tried. "In Western Australia the jury system prevailed at a time when almost the whole of the "inhabitants were convicts from the United Kingdom ; and Sir Charles Dilke tells us that a "criminal indicted before a jury of such persons had so little occasion for uneasiness that they "would hand down a paper to his counsel to save him the trouble of exerting himself, as they "meant to acquit the prisoner."

"Neither for suitability to ordinary nor to political occurrences does trial by jury merit the "panegyrics commonly lavished upon it. Incompetent for the former, it is no valid protection "against the most menacing evils attendant on the latter, It is time that the public mind should "be more awake to its many deficiencies, and to the greater claims on their confidence of a "trained judge, superior alike in experience, in the responsibility of his position, and in freedom "from popular prejudice. To these qualifications the confidence of the people would add one "now wanting, and would ripen the views confined to a small minority into the established "creed of the nation. Such change as we have spoken of will be in accordance with that "respect for education and intelligence which is indispensably required if the increasing power "of the masses is to be indeed a blessing."

The great American advocate Hon. Chas. S. May in his address⁸ at the Michigan Law University in March 1873, defended the jury system in the following terms :—

"I believe that a jury is always the best and fittest tribunal to find the facts of a case. I hold this to be true in the very nature of things. I know the argument that is used upon this point, and what is said about unlettered juries, about difficult mental processes, and about the trained and disciplined mind of the judge. But here I believe is the better test. The facts to be found in a trial in the courts are generally the facts of common life. The deductions and conclusions to be drawn from the facts, in nine cases out of ten, are the deductions and conclusions of ordinary human experience. These do not so much require learning and logic as practical common sense, knowledge of human nature as seen in such men and not in books, and intuitive perception of right and wrong—qualities oftener found combined, I think, in the jury box than the bench. It will not do to say, that because the judge is generally the

8. Quoted at length in Donovan's *Modern Jury Trials*, P. 165.

superior in natural endowments of the average juror and ordinarily is his better in mental training and acquirement, that, therefore, he will the more surely and certainly draw from a mass of tangled facts the right and justice of the case. For facts cannot be dealt with like principles or arbitrary scientific rules, and right and justice are not always to be arrived at like mathematical results. Often the very learning and discipline of the Judge may have unfitted him for this work by educating him away from the people. And it should not be forgotten in this connection that usually the facts in a case are narrated by living witnesses in Court, whose look and manner and the possibility of whose story should be scanned and weighed by men practised in the ways of human nature and not easily to be imposed upon. But grant, if you please, that there is no advantage in these respects with the jury on the grounds that I have claimed ; is there nothing still in the fact that the verdict of a jury is the aggregate wisdom of twelve men, while the finding of a Judge is but the wisdom of one man ? Here (i. e. in criminal cases) its use cannot well be questioned. Here certainly, it needs no defence. The leaning of the law, in criminal causes, should be to the side of protection and humanity. And so it is declared to be. The State is great and powerful, and overshadows the individual ; and though it be necessary for its good that crime be prevented and punished, yet the State is not greatly harmed by the escape of a guilty man. But the conviction and punishment by death or imprisonment of an innocent man is a thing unspeakably shocking. No care can be too great to prevent such tragedy. "Better", then says the human maxim, "that ninety-nine guilty men should escape rather than one innocent man should suffer." And all our human hearts and sympathies respond to the same.....And there is another reason.....the right of trial by jury,.....is needed in the State to guard against tyranny and oppression by the government."⁹

The fact that trial by jury has been introduced in criminal cases, though not in civil cases, in almost all the Continental nations of Europe in the nineteenth century, goes to show that these nations consider it as a palladium, which, lost or won, will draw the liberty of the subject along with it. The wisdom of mankind has reached the definite and decisive conclusion that the determination of questions of fact rests not with the jurist, but with a body of lay men, possessing no intimate knowledge of the law but endowed with the faculties and experience of the common and average man. This body is entrusted with the trust of sifting the truth from circumstances, the frailties of human memory, the passions and evil designs of factions and the defects of understanding. This task is made the function of the jury and the law in positive and certain terms declares that the function shall not be invaded by the trial Judge, but only questions of law in the case are to be determined by him.

After all said and done, the institution of Trial by Jury has so many collateral advantages that notwithstanding its defects and the unsatisfactory character of verdicts in some particular cases or classes of cases, none would like to see it abolished anywhere. Sir James Fitz-james Stephen says¹⁰ :—"If trial by jury is looked at from the political and moral point of view,

9. See also Forsyth's *History of Trial by Jury*, P. 436.

10. *History of the Criminal Law of England* Vol. I, P. 574,

'every thing is to be said in its favour, and nothing can be said against it. Whatever defects it may have might be effectually removed by having more qualified jurors. I think that to be on the jury list ought to be regarded as an honor and distinction. It is an office at least as important as, say, that of guardians of the poor, and I think that if arrangements were made for the comfort of jurors, and for the payment of their expenses on duty, men of standing and consideration might be willing and even desirous to fill the position."

CHAPTER IV.

Trial by Jury is the Englishman's birthright.

As already stated, the precise origin of the system of Trial by Jury is lost in obscurity and antiquarians have traced it back to a very early period in British history. There is a popular belief, fostered by a cartoon in the Houses of Parliament¹ that it existed in some form in England so early as in the days of King Alfred. Opinions differ as to the exact period of its birth and many authorities are inclined to attribute its origin to the feudal institutions of Italy, France and Germany, in which justice used to be administered by the peers of the litigant parties. Be that as it may, the Magna Charta, Ch. 29, referred to it as an existing institution and provided that no person shall be hurt, either in his person or property unless by the judgment of his peers or the laws of the realm: *Nullus liber homo capiatur, vel imprisonatur aut exulatur aut aliquo alio modo destrator, nisi per legale iudicium parium suorum vel legem terrae*. Trial by jury thus secured by the Great Charter has always been regarded as the grand bulwark of the liberties of every Englishman. It is the Englishman's birthright and is that happy way of trial which, notwithstanding all revolutionary times, has been continued beyond memory to the present day, the beginning of which no history specifies, it being contemporary with the foundation of the State, and one of the pillars of it both as to age and consequence². "To-day it would be easier to uproot the foundation of the British throne itself than to tear this venerable land-mark from the British constitution or the affections of the British people"³. So sacred and valuable was the institution in the eyes of the ancestors of the English people that all attempts to subvert it ended with shame and severe punishment of the persons attempting to do so. For example:—Andrew Horn, an eminent lawyer, in his book entitled "The Mirror of Justices" (written in the reign of King Edward I) records that King Alfred caused four and forty justices to be hanged in one year as murderers for their false judgments, most of their crimes being in one kind or other infringements, violations and encroachments of and upon the rights and privileges of juries. Thus he hanged Justice Cadwine because he judged one Hackury to death without the consent of all the jurors; for whereas three of them would have saved him, Cadwine removed these three and put others in their room on the jury, against the said Hackury's consent, so though ultimately twelve men did give a verdict against him, yet those so put in were not accounted as the accused's jurors, for the jurors first sworn to try him could not by law be removed and others put in their stead. Another instance, was given in these words by Lord Chief Justice Coke (2 Inst. fol. 51): "Against this ancient and fundamental law (and in

1. See Chambers' Encyclopædia, Vol. VI., under heading JURY,

2. Burn's Justice of the Peace (1869) 13th Edn. Vol. III PP. 63-64. Referring to Trial per Pais 3 Dalt. C. 186; De Lolme, 287; 3 Blackstone's Commentaries, 379. It should be noted that there are offences which are triable, under

various statutes, without the aid of a Jury and in Courts of Summary Jurisdiction held either before Justices of the Peace sitting in petty sessions or Metropolitan Police Magistrates or Stipendiary Magistrates.

3. Donovan's *Modern Jury Trials*, p. 166.

the face thereof) there was in the eleventh year of King Henry VII C. 3, an Act of Parliament obtained (on fair pretences and specious preamble as to avoid divers mischief etc.) whereby it was ordained—That from henceforth, as well Justices of the Assize as Justices of the Peace, upon a bare information for the King before them made, without any finding or preferment by the verdict of twelve men, should have full power and authority by their discretion to hear and determine all offences and contempts committed or done by any person or persons against the form, ordinance or effect of any statute made and not repealed &c. By colour of which Act, it is not credible what horrible oppressions and exactions to the undoing of multitudes of people, were committed by Sir Richard Empson, Knight and Edmund Dudley, Esqr. (being Justices of the Peace) throughout England. But not only was the statute justly repealed by the statute of I Henry VIII. Cap. 6, but the said Empson and Dudley (notwithstanding they had such an Act to back them, yet being against Magna Charta and consequently void) were fairly executed for their pains ; and several of their under-agents as promoters, informers and the like severely punished, for a warning to all others that shall dare (on any pretence whatsoever) infringe our English liberties”.

Again, Juries were sometimes threatened to be fined and imprisoned. if they did not comply with the sentiments of the Court. When Lord Chief Justice Keeling had attempted something of that kind, it was complained of and highly resented by the then Parliament which accordingly passed a resolution on the 13th December 1667—which appears in the Journal of the Parliament—in these words :—

Chief Justice Vaughan said “that the Court could not fine a jury at the common law where attain did not lie (for where it did it is agreed that it could not), I think to be the clearest position that ever I considered either for authority or reasons of law.”

Dio Mercurii 11 December 1667.

The House resumed the hearing of the rest of the report touching the matter of restraint upon Juries and that upon the examination of Divers witnesses in several cases of restraint put upon Juries by the Lord Chief Justice Keeling ; and thereupon resolved as follows :—

First. That the proceedings of the said Lord Chief Justice in the cases now reported are innovations in the Trial of men for their lives and liberties of the people of England and tends to the introducing of an arbitrary Government.

Secondly. That in the place of Judicature the Lord Chief Justice hath undervalued, vilified and condemned Magna Charta, the great preserver of our lives, freedom and property.

Thirdly. That he be brought to trial in order to condign punishment, in such manner as the House shall judge most fit and requisite.

Die Veneris, 13 December 1667

Resolved etc.

That the precedents and practice of fining or imprisoning of Jurors for giving their verdicts are illegal.

Further such practice was formally condemned on a solemn argument by the Judges in the reign of Charles II⁴. Put quite shortly the facts of this case were the following :⁵.

"At the Sessions for London Sept. 1670 William Pen and William Mead (two of the people commonly called Quakers) were indicted, for that they with others to the number of three hundred on the 14th Aug. 22 Regis in Grace Church Street did with force and arms etc., unlawfully and tumultuously assemble and congregate themselves together, to the disturbance of the peace ; and that the said William Pen did there preach and speak to the said Mead and other persons in the open street ; by reason whereof a great concourse and tumult of people in the street aforesaid then and there and a long time did remain and continue, in contempt of our said Lord the King, and of his Law, to the great disturbance of his peace, to the great terror and disturbance of many of his leige people and subjects, to the ill example of all others in the like case offenders and against the peace of our said Lord the King his Crown and Dignity.

* * * * *

"The trial began on the Saturday ; the Jury retiring after some considerable time spent in debates came in and gave this verdict—Guilty of speaking in Grace Church Street. At which the Court was offended, and told them they had as good say nothing ; adding,—Was it not an unlawful assembly ? You mean he was speaking to a tumult of people there ? But the foreman saying what he had delivered was all he had in commission, and others of them affirming, that they allowed of no such word as an unlawful assembly in their verdict, they were sent back again, and then brought in a verdict in writing, subscribed with all their hands, in these words :—

We the jurors hereafter named do find William Pen to be guilty of speaking or preaching to an assembly met in Grace Church Street the 14th of August 1670, and William Mead not guilty of the said indictment.

"This the Court resented still worse, and therefore sent them back again, and adjourned till Sunday morning ; but then too they insisted on the same verdict ; so the Court adjourned

4. Bushell's case, Vaugh. Rep. p. 135.

5. Hawles' *The Englishman's Right*. Referring to the report of this case in Vaugh. Rep. p. 135. the learned author in reply to a question whether the illegal practice could some day be revived or justified has observed :—

"No such thing can be done without apparent violating and subverting all law, justice and modesty ; for though the precedent itself be valuable and without further enquiry is wont to be allowed, when given thus deliberately by the whole Court ; yet it is not only that, but the sound, substantial and everlasting reasons whereon they founded such their resolves that will at all times justify fining of Juries in such

cases to be illegal. Besides as the reporter was most considerable, both in his capacity as Lord Chief Justice and for his parts, soundness of judgment and deep learning in the Law ; so such his book of reports is approved and recommended to the world (as appears by the page next after the epistle) by the Right Honourable the present Lord Chancellor of England ; Sir William Scroggs, now Lord Chief Justice of England ; My Lord North, Chief Justice of the Common pleas ; and, in award, by all the Judges of England at the time of publishing thereof ; so that it cannot be imagined how any Book can challenge greater authority, unless we should expect it to be particularly confirmed by Act of Parliament."

till Monday morning ; and then the Jury brought in the prisoners generally Not Guilty ; which was recorded and allowed of. But immediately the Court fined them forty marks a man, and to lie in prison till paid."

The inroads made on this birthright in England is nothing compared with the treatment that Ireland received from her so far as this matter is concerned. Special legislation was on many occasions resorted to in times of great national excitement for the purpose of withdrawing from the consideration of juries in Ireland for a limited period certain crimes of an agrarian or quasi-political character. By the Crimes Act, 50 & 51 Vic. Chap. 20, special powers, extending as high as that of imposing sentences of six months' imprisonment, on conviction of certain specified offences, were conferred on specially constituted magisterial Courts sitting without a jury. It is obvious that the safety of the government, in abnormal times, calls for measures of this description.

'Trial by peers' has given occasion to many accused persons to claim that they should be tried by gentlemen of a rank equal to their own. For instance, Sir Roger Casement after the Jury had brought in a verdict of "Guilty" of high treason against him, and in answer to the question, "What have you to say for yourself why the Court should not pass sentence and judgment upon you to die according to law, made a long rhetorical statement protesting against the jurisdiction of an English Court and his trial by an English Jury. He declared that the Court⁶ was to him, as an Irishman, a foreign Court, and that he had an indefeasible right, as an Irishman, to be tried in Ireland by an Irish Court and an Irish Jury. He said⁷.—

"If I did wrong in making that appeal to Irishmen to join with me in any effort to fight for Ireland, it is by Irishmen and by them alone, I can be rightfully judged. From this Court and its Jurisdiction I appeal to those I am alleged to have wronged and to those I am alleged to have injured by my 'evil example', and claim that they alone are competent to decide my guilt or my innocence. If they find me guilty the statute may affix the penalty, but the statute does not override or annul my right to seek judgment at their hands. This is so fundamental a right, so natural a right, so obvious a right, that it is clear the Crown were aware of it when they brought me by force and by stealth from Ireland to this country. It was not I who landed in England, but the Crown who dragged me here, away from my own country to which I had turned with a price on my head, away from my own countrymen whose loyalty is not in doubt, and safe from the judgment of my peers whose judgment I do not shrink from. I admit no other judgment but theirs. I accept no verdict save at their hands. I assert from this dock that I am being tried here, not because it is just, but because it is unjust. Place me before a jury of my own countrymen, be it Protestant or Catholic, Unionist or Nationalist, Sinn Feineach or Orangemen, and I shall accept the verdict and bow to the statute and all its penalties. But I shall accept no meaner finding against me than that

6. The Court of King's Bench of England. The trial commenced on the 26th June 1916 before Viscount Reading, the Lord Chief Justice of England, Mr. Justice Avory and Mr. Justice Horridge and a Jury. In 1903 Dr. Lynch

was tried and convicted by the Court of Queen's Bench for treason committed in South Africa during the Boer War.

7. *Trial of Roger Casement*, edited by G. H. Knott; pp. 199-200.

of those whose loyalty I endanger by my own example and to whom alone I made appeal. If they judge me guilty, then guilty I am. It is not I who am afraid of their verdict, it is the Crown. If this be not so, why fear the test. I fear it not. I demand it as my right."

In the trial of Maharaja Nundkumar for forgery held on the 8th June 1775 in the Supreme Court at Calcutta (Court of Oyer and Terminor and Gaol Delivery holden in and for the Town of Calcutta and Factory at Fort William in Bengal and the limits thereof and the factories subordinate thereto) before Sir Elijah Impey, Kt., C. J. and Chambers, La Maistre and Hyde JJ,—held under the English system which was then in force, the prisoner being called to the bar and arraigned and the indictment read, his Counsel tendered a plea to the jurisdiction of the Court. But the Chief Justice pointing out an objection thereto which went both to the matter of fact and the law contained therein and desiring the Counsel to consider if he could amend it and take time for so doing, he, after having considered the objection, thought proper to withdraw the plea. Whereupon the prisoner pleaded 'Not Guilty', and being asked by whom he would be tried, he answered by God and his peers. The Court desired to know whether he had any particular reason for using the word 'peers'. His Counsel answered that the prisoner, being a man of the first dignity in the Kingdom, thought he should be tried by people of equal rank with himself agreeable to the law of England, which permits every man to be tried by his peers. The Court asked who the Maharaja considered as his peers. His Counsel answered, he must leave that to the Court. Chief Justice,—“The trial can only be by “such persons as are by the Charter required to form the jury. A Peer of Ireland tried in “England would be tried by the common jury. The Charter directs that in all criminal prosecu- “tions the prisoner should be tried by the inhabitants of the town of Calcutta, being British “subjects.”

8. *Trial of Nundkumar*, with an Introduction, by
Mr. P. Mitter,

CHAPTER V.

First efforts at the administration of English Criminal Law in India.

The first efforts at the administration of English Criminal Law in India were confined to the British Settlements in India and among the British subjects. These settlements came to exist for trading purposes. After the discovery in 1498 by Vasco Da Gama of Portugal of a passage by sea to India, by sailing round the Cape of Good Hope, several nations of Europe came to trade in the East Indies : First, the Portuguese, then the Dutch ; and they were followed by the English and the French. In 1599 an Association of merchants was formed in London for the purpose of opening a trade in India, and in 1600 they obtained a Charter from Queen Elizabeth (43 Eliz.) which granted them the exclusive privilege of this traffic for fifteen years.¹ This was the origin of the East India Company which confined itself to commerce for a hundred and fifty years and then took up arms in defence of its factories, and in less than a Century established British sovereignty from the Himalayas to Cape Comorin, and from Peshwar to the borders of Siam. For the purpose of carrying on its trade the Company opened factories in several places. Of these, those at Bombay and Calcutta subsequently became places of growing importance. The factory at Madras was established in 1639. The island of Bombay with its dependencies was ceded to the Company by King Charles II in 1668, who obtained it in 1661 from Alphonso VI, the King of Portugal, when he married the latter's sister, as part of her marriage dower. The factory at Calcutta was founded in 1690, and in 1698 the Company with the consent of the Mahomedan Governor of Bengal purchased the three villages of Calcutta, Chuttanutty and Govindpore, on which the present city stands. All these places were fortified with the permission of the native rulers and they became the leading factories in their different localities and exercised control and supervision over the subordinate depots and places in their vicinity.

In those early days the Company did not and could not claim any of these places (except Bombay) as British territory. But their position was extremely anomalous. "Though their factories were part of the dominion of the Moghul, their own law was administered in them, and their own national character imparted to them as completely as if they were parts of English territory"². For, "factories established amongst races alien in religion, habits and customs have always been deemed by the law of nations which has prevailed in Christendom to be so far exclusive possessions, or at least privileged places, that all persons during their residence within them have been considered for most purposes to be clothed with the national

1. First Charter was dated 31st December 1600 ; 2nd Charter was granted to the original Company on 31st May 1609 ; 3rd Charter on 3rd April 1661 ; 4th Charter on 5th October 1677 ; 5th Charter on 9th August 1683 ; 6th Charter on 12th April 1686 ; 7th Charter on 7th October 1693 ; and 8th Charter on 13th April 1698. A Second East India Company was

formed under a Charter dated 5th September 1698 in pursuance of a Statute 9 and 10 William III. C. 44 ; and the two Companies were united in 1708 under the award of Lord Godolphin in the reign of Queen Anne.

2. Cowell's *Courts and Legislative Authorities in India*—6th Edn. Pp. 9-10.

character of the State to which the factory has belonged"³. In the early Charters we do not find any authority for the establishment of any criminal court for the trial of offences, though the Charter of Queen Elizabeth (43 Eliz) in 1600 and of James I in 1609 (31st May) granted to the Company the power to make laws, ordinances &c. for the good government of the said Company and for all factors, masters, mariners or other officers employed or to be employed in their voyages and for the better advancement and continuance of their trade and traffic, and to provide such pains and penalties by imprisonment or fine as might be necessary, provided that such laws be reasonable and not contrary or repugnant to the laws, statutes, or customs of the Queen's realm. The power to legislate, it should be observed, contains no express reference to factories or territories. In this connection it should be noted that Sir Thomas Roe, the ambassador of James I secured from the Moghul Emperor in 1618 the privilege for the factory of Surat, that disputes between the English only should be decided by themselves. In 1622 James I (20 Jac. I dated 4th Feb.) granted a Charter authorising the East India Company to chastise and correct all English persons residing in the East Indies and committing any misdemeanour, either with martial law or otherwise.⁴

The first indication of the establishment of criminal courts in India, we find in the Charter of Charles II (13 Car. II dated 3 April) granted in 1661, which gave to the Governor and Council of the several places belonging to the Company, power "to judge all persons belonging to the said Governor and Company or that should live under them, in all causes, whether Civil or Criminal, according to the laws of this Kingdom, and to execute justice accordingly. And in case any crime or misdemeanour shall be committed in any of the said Company's factories in the said East Indies where judicature cannot be executed as aforesaid, for want of a Governor and Council, there, then, and in such case it shall and may be lawful for the Chief factor of that place and his Council to transmit the party, together with the offences to such other plantation, factory, or fort, where there is a Governor and Council, where justice may be executed, or into this kingdom of England, as shall be thought most convenient, there to receive such punishment as the justice of the offence shall deserve". It also gave the Company the right to make peace and to wage war with any people of India not Christians and to seize and deport to England all unlicensed Englishmen. Thus the Company which existed only for trade was getting some of the essential attributes of Government⁵.

The island of Bombay came to be the only territorial possession of the Company with sovereign rights. The Charter relating to the island of Bombay made in the year 1668 (20 Car. II dated 27th March 1668) after reciting the Charter of 13 Car. II dated 3rd April 1661 and the marriage treaty of the 23rd. June 1661, stated,—“That the Company were empowered to make laws and constitutions for the good Government of the island and their inhabitants; and to impose punishments and penalties, extending to the taking away of life or member when the quality of the offence should

3. Ibid, Pp. 12-13.

4. See *Naoroji v. Rogers*, (1867) 4 Bom. H. C. R. 1, 28.

5. Marshman's *History of India*—P. 208.

require, it, so that the punishments and penalties were consonant to reason, and not repugnant to, but as near as might be agreeable to the laws of England. The Governor and Company, or Governor and committees of the Company, were also empowered to appoint Governors and other agents for the said island, to be invested with a power of ruling, correcting and punishing His Majesty's subjects in the said island, according to justice, by courts, sessions and other forms of judicature, like those established in England, by such Judges and officers as should be delegated for that purpose. The Charter also purported to sanction the use of military law for military purposes, or in the case of rebellion, mutiny or sedition. It further declared that "all and every the persons being our subjects which do or shall inhabit within the said Port and island of Bombay, and every of their children and posterity &c., within the precincts and limits thereof, shall have and enjoy all liberties, franchises, immunities, capacities and liabilities of free denizens and natural subjects within any of our dominions, to all intents and purposes, as if they had been abiding and born within this our kingdom of England, or in any other of our dominions".

In 1683 Charles II granted a further Charter (35 Car. II dated 9th August) which empowered the Company to establish at such places as they might appoint, Courts of Judicature to determine all mercantile and maritime causes, to consist of one person learned in the Civil laws and two merchants and to decide according to equity and good conscience and according to the laws and customs of merchants. These provisions were continued in the Charter (2 Jac II dated 12th April) granted by James II in 1686. It confirmed also the Charters of 1661 and 1668.

So we find that in those early days of the Company, an Englishman committing an offence in India, was liable to be punished under martial law^a; then he was made triable by the Governor and Council of the place wherein the offence was committed, according to the English criminal law and punishable accordingly. The natives living within the settlements or factories, except in the isle of Bombay, were not British subjects and so not triable under the English law. They were subjects of the native rulers within whose territory their factories were situate, and were triable by their Courts. The expression "persons that should live" under the Company, might not, possibly, include the native residents or the native servants or the employees of the Company, for the Company then had no sovereign rights over the lands they were occupying but were there only on sufferance, and consequently under the protection of the native rulers themselves. It was held by Lord Kingsdown in *Advocate General of Bengal v. Ranee Surnomoye*, 9 Moore's Ind. App. 387 at p. 426, that the Charter of 1661 did not confer jurisdiction on the Company (by the authority given to the Governors and their Councils to judge all persons belonging to the said Company or that should live under them) over native subjects of the Moghul.

In the island of Bombay the Company's position was different as they acquired sovereign rights under the Grant from the Crown; consequently they were empowered to make laws

6. For an instance of capital punishment by martial law at Bombay in 1674, see Bruce, 367,

368 and Anderson, 219. See also *Naraji v. Rogers*, (1867) 4 Bom. H. C. R. 1, 38.

and constitutions for the good government of the inhabitants thereof and to impose punishments and penalties extending to the taking away of life or member.

As observed by Westropp. J., in *Naoroji v. Rogers, Supra*, at p. 39,—“Bombay was not a factory such as the Company had as Surat or on the Hooghly, or in any other parts of India. It was not held by the Company from the Moghul or any other Native power. The full sovereignty of the island had been acquired by Charles II from the King of Portugal, and Charles II had full powers by those letters patent of 1668 granting the island to the London Company, expressly purporting to provide for legislation and administration of justice in accordance with the law of England, and by reference incorporating within those letters patent all jurisdictions &c, mentioned in the Charter of 3rd April 1661, to introduce English law for the government of all persons resident in Bombay”. In 1669-1670 Governor Aungier had two Courts of Judicature in the island: The Inferior Court consisting of a Company's Civil servant, assisted by natives, who were to take cognizance of all disputes under the amount of 200 Xeraphins, and the Superior Court to consist of the Governor or the Deputy Governor and Council, to whom appeals were competent from the Inferior Court, to take cognizance of all civil and criminal cases whatever, and their decisions were to be final and without appeal. In 1670-71, the Court of Directors directed “that care should be taken that trial by jury should be introduced into the Courts of Justice, agreeably to English law.”⁷ The researches of Sir Charles Fawcett, formerly a Judge of the High Court of Bombay, published recently in his book, “*The First Century of British Rule in India*” have led to the discovery of the laws which the Company framed in 1669 under the authority granted by the Charter of 1668, for the good government and due administration of justice in Bombay. The laws were divided into six main Sections as follows :—I. Touching religion and worship of God ; II. Touching the administration of justice and common rights ; III. Establishing a method for due proceedings ; IV. Directing registration and sales, etc. ; V. Prescribing penalties for certain offences ; VI. Touching military discipline and the prevention of disorder and insurrection. The third portion of Section II. contained a provision that no person should be divested or dispossessed of houses, goods or lands or other rights or suffer corporal punishment for any cause or crime before trial and conviction by a jury of twelve men except as otherwise provided by the laws or any future law, similarly enacted. The IIIrd Section was the most important. It provided : (1) for the establishment of a Court of Judicature for the decision of all Suits in Criminal matters under a Judge to be appointed by the Governor in Council ; (2) that all trials in the Court should be by a jury of twelve Englishmen except when any party to the dispute was not English, in which case the jury was to be half English and half non-English ; (3) for the appointment of Justices of the Peace and Constables, for the maintenance of order, apprehension of criminals, and the execution of warrants, etc. ; (4) for regular sitting of the Court, the recording of its proceedings in registers, and the fixing of reasonable court-fees ; (5) for a right of appeal

7. There is an instance of trial held in 1669 by Aungier and his Council with a jury, consisting of half English and half Portugese, of Richard

Ball for killing Diego Rodriguez. *Naoroji v. Rogers* (1867) 4 Bom. H. C. R. I, 48.

from the Court of Judicature to the Governor or Deputy Governor and Council, which was constituted the Supreme Court in the fort and island .⁸

Later on, however, as the Company were permitted to fortify their factories at Madras and Calcutta and take their own measures for their defence, as natives assured of better security for their lives and property came to reside more and more in these places, and as the military forces of the Company came to be gradually strengthened and their powers felt by the native rulers, who were always quarrelling amongst themselves, the Company came to be considered as the *de facto* rulers of these towns, and the native residents agreed or submitted themselves to be governed by the English criminal law, as the authorities of the Company did not know of any other law and could not accept the Mahomedan criminal law as their guide, nor were they authorised to make any special law for the natives in these towns as they were authorised to do for the inhabitants of Bombay. In any case, the Company were very anxious to have the judicial administration placed on a better footing as subsequent history shows.

Thus, following the lead of Governor Aungier given in Bombay, Streynsham Master, who was appointed Governor of Madras 1678, by a resolution of the Council dated 18th March 1678, constituted the Governor and Council a Court of Judicature which was to sit twice a week for the trial of all Civil and Criminal cases (except petty cases) by juries in accordance with the laws of England.⁹

In 1693 when the English Company in London were devising large schemes for their young settlement at Calcutta, they proposed the establishment of a Court of Judicature which would take cognizance of disputes between British subjects residing at that place. On April 10th, 1693, they wrote.—¹⁰

"24. We send you this a short extract of two or three paragraphs out of our General Letter to Bombay and Suratt, by which you will see that we have taken as much care as we can to prevent the irregularities of such as sail upon our country permissive ships from Suratt, etc. And now it will be your part to erect such a Judicature in Bengal after the manner you have seen practised in Fort St. George to judge and punish by fines to the Company and otherwise such as shall offend hereafter, wherein we doubt not but you will proceed with

Pp. 14-16. A copy of the Company's laws for Bombay is given at pp. 17-28. Other instances of trial by jury are that of Captain Gary and Captain Shaxton in 1674, but such a trial was not held in all cases at that time; though generally trial by jury was resorted to in the case of such crimes as theft, murder and mutiny, and the punishment of the offender was not always confined to the penalties prescribed by the Company's laws or even by the laws of England: thus, (1) a wench was punished by

causing her to be shaved and set on an ass and led through the town; (2) a wizard was tried by a jury of twelve and sentenced to death and burned alive (See p. 43).

9. Fawcett's *The First Century of British Justice in India*, P. 201.

10. Taken from "Bengal Past and Present" in the Journal of the Calcutta Historical Society, Vol, VIII, Serial No, 15 (Jan-Mar, 1914) and Vol, X, Serial No. 19 (Jan-Mar 1915)

exact justice and great moderation, which is always to be used to the first offenders. Besides if you find any refractory you may reduce them to obedience by denying them the privilege of our passes and dusticks (dustaks) etc.

"To this the President at Calcutta replied on December 14th, 1694 :-

"By the death of Agent Charnock your Honours are disappointed in your intentions and expectations of having a Court of Judicature erected in Bengal and for that reason we presume the Hon'ble President and Council of Fort St. George took the Commission out of your Honours' Packett before it came to us. Our endeavours have been fruitless hitherto in procuring the Nabob's and Duan's consents for a settlement in this place and we have no hopes of a grant for it so long as this Duan continues.

"With this the Directors concurred, for on May 14th, 1696, they wrote.—

"Till the Company be settled by Act of Parliament we think it not very material to resettle a Judicature in Bengall, since you may send to the Fort (meaning Fort) St. George, Madras, or send thither for a warrant or bring up any refractory or disorderly persons."

In 1693, two Charters, 5 William and Mary, dated 7th October and 11th November, respectively, had been granted confirming the previous Charters.

In 1698 an Act of Parliament (9 & 10 William III C. 44) was passed, in pursuance of which a Charter was granted on 5th September 1698 to a Second East India Company by which the Company were vested with the Government of all their forts, factories and plantations and were empowered to raise, train and muster such military forces as might be necessary for the defence of the said forts, &c. ; the sovereign right, power and dominion over all the said forts &c. being reserved for the Crown. The Charter also empowered the Company to establish Courts of Judicature, similar to those granted in the previous Charters to the old Company. The two Companies were united under the award of Lord Godolphin in 1708 in the reign of Queen Anne. A Court of Directors were formed to be elected by the General Court of Proprietors who were vested with the chief authority and control over the affairs of the United Company.¹¹ In December 1699 the Company declared Bengal a presidency with Sir Charles Eyre as the first President of Fort William.¹²

In 1700 an Act (11 & 12 William III C. 12) was passed by which divers Governor, Lieutenant-Governor, Deputy-Governor, or Commander-in-chief found guilty of approving any of His Majesty's subjects beyond the seas might be tried in England in the Court of King's Bench or before such Commissioners and in such county of the realm, as should be assigned by His Majesty's commission, and by good and lawful men of the same county, and that such punishments should be inflicted on such offenders as are usually inflicted for offences of like nature committed in England.

In 1726 the United Company again moved in the matter of establishing Courts at Calcutta and other places, and the Court of Directors represented by petition to King George I, that

11. The United Company subsequently came to be called the "East India Company".
Vide. 3 & 4 Will. IV. Ch. 85, S. 111.

12. Fawcett's *The First Century of British Justice in India*, p. 207.

there was a great want at Madras, Fort William and Bombay of a proper and competent power and authority for the more speedy and effectual administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences and misdemeanours. Accordingly, the existing Courts, whatever they may have been, were superseded, and the Crown by Letters Patent (13 Geo. I dated 24th Sep. 1726) established Mayor's Courts at Madras, Bombay and Fort William, each consisting of a Mayor and nine Aldermen, seven of whom with the Mayor were required to be natural-born subjects. They were declared to be Courts of Record and were empowered to try, hear and determine all civil suits, actions and pleas, between party and party. The civil jurisdiction was over any persons, at the time of the institution of the suit, residing or being or who, at the time the cause of action accrued, resided within the said Forts and Towns or the precincts, districts or territories thereof. The judgment and sentence was to be according to justice and right; and the execution was to be by seizure and sale of the goods and chattels of the defendant. From these Courts an appeal lay to the Governors and Councils and thence to the King in Council in causes involving the amount of 1000 pagodas (about Rs. 4000). The Governors and Councils were also constituted Courts of Oyer and Terminer and were authorised and required to hold Quarter Sessions for the trial of all offences except high treason, committed within the towns of Calcutta, Madras and Bombay or within any of the factories subordinate thereto. The criminal trials were directed to be conducted "in the same or the like manner and form as near as the conditions and circumstances of the place and inhabitants will admit of, as any our Justices of the Peace or Commissioners of Oyer and Terminer and Gaol Delivery do or may proceed by virtue of any Commission by us granted for that purpose," that is to say, with the assistance of a grand and petty Jury. The Governors and Councils of Madras, Bombay and Fort William, respectively, were also empowered, with the sanction of the Court of Directors, to make bye-laws, rules and ordinances for the good government and regulation of the several corporations thereby erected, and of the inhabitants of the said several towns, places, and factories, and to impose reasonable pains and penalties upon offenders against them, "provided that all such bye-laws, rules, and ordinances, and all pains and penalties thereby to be imposed be agreeable to reason and not contrary to Laws and Statutes of England". Of this Charter, Peacock C. J. in the *Advocate General of Bengal v. Runee Surnomoye*, (See 9 Moore's I.A. at p. 394), said with reference to Calcutta: "It is a well-recognised doctrine, and one which has been acted on by this Court for more than half a century, that speaking generally, the first introduction of English Law into Calcutta was effected by the Charter of George I, by which, in the year 1726, the Mayor's Court was established. It is unnecessary to cite authorities in support of that position". As a matter of fact, in Calcutta trial by jury was not introduced till the Quarter Sessions were held by the Governor and Council under the Charter of 1726.¹³

In 1727, the Charter 1 Geo. II dated 17th November, granted to the East India Company the fines &c, imposed by the Mayor's Court.

13, *Ibid.* P. 211,

In August 1749 Madras, which had been captured in 1746, was restored by the French to the English Company. The Company were advised by the Solicitor-General and their own Standing Counsel that the capture of Madras by the French had terminated the powers and authorities granted by the Charter of 1726. As a new Charter was thus rendered necessary for Madras, the Directors thought that they might make use of this occasion, and while surrendering the Charters for Bengal and Bombay, to obtain Charters embodying various improvements, of which experience had proved the need. Accordingly, King George II granted a new Charter dated 8th January 1753 (26 Geo II), re-establishing the Mayor's Courts at Madras, Calcutta and Bombay with some amendments intended to remedy defects of which the Company had complained ; suits were declared to be maintainable against persons residing or being at the time of the institution of the suit, or at the time of the accruing of the cause of action, "unless the same shall be between the Indian natives only as aforesaid, or unless such cause of suit shall not exceed five pagodas ". The principal addition made was the establishment of Commissioners to serve as a Court of Requests for the recovery of debts not exceeding five pagodas¹⁴ in amount. In their Letter accompanying the Charter, the Directors remarked :—

"With respect to criminal proceedings we have nothing to add to the instructions already given, unless it is that the legislature in the last session made an Act of Parliament, for better preventing the horrid crime of murder, several copies of which we send you herewith. So if the Commissioners of Oyer and Terminer think that it may be a means to prevent or deter persons from committing that horrid crime, they may, in case of conviction, proceed to judgment and execution, and disposal of the body in the manner that the Act directs."

The Charters of the Mayor's Courts thus established four Judicatures in Calcutta exercising jurisdiction from the English Crown over British subjects, natives in their employment, and persons who voluntarily placed themselves under the Courts :

1. The President and Council (in 1726 "five of the Council"; in 1753 " all the Council") were Justices of the Peace and Commissioners of Oyer and Terminer and Gaol Delivery, and to hold Quarter Sessions.

2. The Mayor's Court.

3. The President and Council, a Court of Record to hear appeals from the Mayor's Court.

4. After 1753, twelve Commissioners to form a Court of Requests.

Turning to the subject of the law administered by these Courts, it may be said at once that it was the law of England as it stood at the introduction of each of the Charters i, e, 1726 to 1753, and from 1753 onwards as the same law stood in 1753. Impey at his impeachment stated :—

14. *Pagoda*, a Madras coin, equal to 8 shillings
or Rs. 4/-

"Among the records I found the instructions sent out by the Court of Directors with that Charter (the Charter of 1753) and expecting, as I really procured, great information from them, ordered them to be copied. These instructions direct the new Court to proceed against prisoners not understanding English, tells what crimes are misdemeanours, what simple felonies, what within clergy, what capital and all distinctions on that head, what punishments are to be inflicted, amongst which transportation is particularized ; how to proceed in each case ; and gives precedents for indictments of such crimes, the oath for an interpreter where the prisoner does not understand English, directions how to proceed when any Portuguese Gentoo or native of India, not born of British parents, happens to be prosecuted for any capital offence, which the instructions say 'will probably often happen' ; they are told that stealing goods above the value of forty shillings out of a dwelling-house, above five shillings privately out of a shop or warehouse or stable, and from every person above five shillings is capital ; they are told that the jury may mitigate the sum¹⁵ so as to make the offence clergyable, and the Clerk of the Peace is directed to mark the judgments so mitigated to distinguish them. They give precedents for indictments of all these crimes, and add indictments for burglaries, highway robberies, and horse-stealing as cases 'likely to happen'. In a marginal note they are told in cases where any Act of Parliament makes a crime felony, which was not so at Common Law, the indictment must conclude 'against the form of the Statute'. They are directed to enlarge on His Majesty's princely goodness, who on the humble application of Honourable Company, has thought fit to extend his care and the benefit of his laws to his most distant subjects in the British Settlements in the East Indies. This, the Directors desire, may be done the first time the Commission is put into execution".

Sir Gilbert Elliot (the mover of Impey's impeachment, afterwards the first Lord Minto) was mistaken as to the date of these instructions when he asserted that they were in fact sent out with the Charter of 1726. No evidence is forthcoming to support Sir Gilbert's assertion and, on the other hand, in a volume of Early Parliamentary Papers (printed) there is to be found 'Extracts from the Book of Instructions for putting into execution the E. I. Company's Charter for erecting and holding Courts of Justice, Civil and Criminal, at Fort St. George and the Company's other settlements in the East Indies, dated the 8th June 1753, 26th year of the reign of George the Second.' These extracts clearly are made from the instructions cited by Impey.

During Impey's impeachment, Mr. Broughton Ross was asked whether he knew "any thing of any intention to carry the English Criminal Law into execution in the town of Calcutta". He replied :—

"I have found amongst my papers a copy of a proclamation issued by His Majesty's Justices for the Town and District of Calcutta at their Quarter Sessions held on the 3rd June 1762 in which such an intention is announced.¹⁶

15. The Jury in England are known to have settled the degree of the offence at their own pleasure so as to avoid the strictness of the law when the penalty imposed by the law appeared to them too severe. For instance, the punishment

for stealing property to the amount of 40 S. being death, it has happened that the Jury have declared a man who had stolen 10 guineas, guilty of theft to the amount of 39 S.

16. A diligent search for a copy of the Proclama-

A very interesting document¹⁷ has been published which gives an account of the several persons who were prosecuted in the Court of Quarter Sessions in Calcutta for criminal offences according to the Laws of England, from the 1st of January 1762 to the 1st of October 1774. The first case is dated August 27th, 1762, *i. e.*, subsequent to the proclamation mentioned above. Out of 45 cases in which 62 persons were implicated, Indians were in the majority and in 21 cases the sentences were capital. Two cases may be taken as illustrative of the law enforced by the Courts, one out of this list and the other not in it. Both the cases are to be found in Verelst's "View of the English Government in Bengal."¹⁸ Verelst has left it on record as his mature judgment :

"As well might we transplant the full grown oak to the banks of the Ganges, as dream that any part of a Code, matured by the patient labour of successive judges and legislators in this island, can possibly coalesce with the customs of Bengal."

The first case is described as follows :—

"In the year 1762 a native detected one of his women in an act of infidelity. Throughout the East women are wholly subject to the will of his master, and every husband is the avenger of his own wrongs. The man, therefore, satisfied of her guilt, proceeded to punishment by cutting off her nose. He was arraigned at the Calcutta Sessions. He confessed the fact, but urged that he had done nothing to offend the laws and customs in which he had been educated ; that the woman was his property ; and that by such customs he had a right to set a mark on her for her infamy ; that he had never heard of the laws by which they tried him ; did they believe that if he had known the punishment to be death he would ever have committed what they now call a crime ? The man, notwithstanding this defence, was condemned and hanged ; for, if the Courts possess jurisdiction they must proceed according to the English Laws."

The second case is interesting as forming a precedent for the Supreme Court's sentence upon Maharaja Nund Coomar on his conviction of forgery. Of this case Verelst writes :—

"The amazing extent of public and private credit in great Britain has induced our legislature to punish forgery with death. Under this law a native of India was condemned in the year 1768. But so extravagant did the sentence appear where experience had never suggested that principle, such the disproportion in their eyes between the punishment and the crime, that the principal inhabitants of Calcutta expressed their alarm in a petition to the Governor and Council, and upon a proper representation Radha Churn Metre received a pardon."

tion appears to have been made at the Records Department of the India Office, but in vain. The House of Commons on February 25th, 1788, called on the Court of Directors to produce a copy of the proclamation, but apparently this order was not complied with.

17. See '*Bengal Past and Present*' in the Journal of the Calcutta Historical Society, Vol. VIII. Serial No. 15 (Jan-Mar. 1914).

18. Written in 1773.

"The weakness of the Judicatures of 1726 and 1753 arose from the fact that they tended to be in fact but branches of the Company's Executive Government and they therefore afforded imperfect means of resistance to the class interests of the Company's servants, at a time when the Company's servants were bidding fair to monopolize the trade of the country. . . . A system under which the Executive Government and Judicial Authority were combined in the hands of men who had commercial interests of their own to defend. The Aldermen of the Mayor's Courts were as a rule anything but what the term 'Alderman' etymologically implies : they were mostly junior servants of the Company in the days when the Company's servants, without any special training at home, began their Indian career a little more than midway in their 'teens' (On the occasion of Maharaja Nund Coomar's trial the combined ages of the Under-Sheriff of Calcutta and the acting Persian translator scarcely amounted to 42). Nor was the Charter itself so explicit a guide as occasion required : it left room for doubts as to the amenability to subpoena of witnesses residing beyond the Mahratta Ditch, and left room for doubts which could not be dispelled without a tedious reference to the law authorities in England."

One important fact should also be noticed. The Jurisdictions of the Criminal Courts established by the Charters of 1726 and 1753 over the Natives were kept intact, but in the Charter of 1753, although there was no precedent for it in the Charter of 1726, civil suits between Natives were expressly excepted from the jurisdiction of the Mayor's Courts, and directed to be determined among themselves ; which appears to involve a renunciation of sovereign authority at that time over Natives.¹⁹

The victory of the battle of Plassey in 1757 and the Grant of the Dewanny of Bengal, Behar and Orissa by the Moghul Emperor in 1765, made the East India Company the virtual rulers of Bengal, Behar and Orissa. The servants of the Company committed all sorts of oppression over the inhabitants of the country. A state of anarchy ensued. The powers of the Courts established at Calcutta were very limited, being confined to offences committed within the limits of Calcutta and its dependent factories. No doubt, in 1770, an Act (10 Geo. III. C. 47) was passed whereby the Company's servants, guilty of oppression or other crimes in India, might be tried in England, but it could give no relief as, amongst others, the difficulty of bringing witnesses from India would be almost insuperable. The high-handed doings of the servants of the Company at last roused the public feeling in England and a Committee of Secrecy was appointed by Parliament to enquire into the affairs of the Company. On the report of that Committee in 1773, an Act was passed (13 Geo. III. C. 63) commonly called the Regulating Act, the 13th Section of which, amongst others, empowered the King in Council by his Charter to establish a Supreme Court of Judicature at Fort William in Bengal, to consist of a Chief Justice and three Judges (subsequently reduced to a Chief Justice and two Judges, by S. 1 of 37 Geo. III, C. 142) who were to be appointed by the Crown and to be barristers of England or Ireland of not less than five years' standing. The Court was to have power to exercise all Civil, Criminal, Admiralty and Ecclesiastical Jurisdiction, and to establish rules

19. Cowell. *Courts and Legislative Authorities in British India*, P. 17.

of practice and process, and to do all things necessary for the administration. It was also declared that it should be a Court of Record, and a Court of Oyer and Terminer and Gaol Delivery for the town of Calcutta and factory of Fort William, and the factories subordinate thereto. The 14th Section enacted that the Supreme Court shall have full power and authority to hear and determine all complaints against any of His Majesty's subjects for any crimes, misdemeanours or oppressions; and its Jurisdiction, powers and authorities shall and may extend to all British subjects who shall reside in the kingdoms or provinces of Bengal, Behar and Orissa, or any of them under the protection of the United Company. The 34th Section provided that all offences and misdemeanours which shall be laid, tried and inquired of in the said Supreme Court shall be tried by a jury of British subjects resident in the town of Calcutta, and not otherwise.²⁰ The 38th Section enacted that the Governor-General and Council of the United Company's settlement at Fort William, and the Chief Justice and other Judges of the Supreme Court shall have full power and authority to act as Justices of the Peace for the said settlement and for the several settlements and factories subordinate thereto; and to do and transact all matters and things which to the office of a Justice or Justices of the Peace do belong and appertain; and for that purpose the said Governor-General and Council are hereby authorised and empowered to hold Quarter Sessions within the said settlements four times in every year, and the same shall be at all times a Court of Record. By the 39th Section, powers were reserved for the Court of King's Bench in England to inquire into, hear and try any crime, misdemeanour or offence, committed by any of the high officers of the Company, such as Governor, or Judge of the Supreme Court &c., or by any other servant of the Company, or by any of His Majesty's subjects residing in India, against any of His Majesty's subjects, or any of the inhabitants of India. In Section 40, the Court of King's Bench was authorised to issue writ of mandamus on Judges of the Supreme Court in Calcutta, or on the Judges of the Mayor's Courts²¹ at Madras and Bombay, for the examination of witnesses in India and to send the records of such examination to England. Section 41 authorised the Court of King's Bench in England to issue writ of mandamus for the examination of witnesses in India on the Governor-General in Council when information is laid against the Chief Justice or any other Judges of the Supreme Court. Section 42 provided that in cases of proceedings by Bill in Parliament, touching any offences against this Act, or any other offences committed in India, the Chancellor or the Speakers of the Houses of Parliament may similarly issue warrants for the examination of witnesses in India. Section 45 made an exception to the admissibility of evidence taken in India in capital cases; except where the proceedings are taken in Parliament, where such evidence could be given.

20. By 7 Geo. IV. C. 37 all sufficient persons, not being subjects of a Foreign State, were, with certain exceptions, made eligible to serve on juries, subject to rules of Court to be approved of by the Crown. By 2 & 3 Wm. IV. C. 117, Sec. 2, the exceptions were abolished.

21. The Mayor's Courts at Madras and Bombay

were abolished and their places supplied, first by Recorder's Courts, and subsequently by Supreme Court of Judicature resembling in their constitutions and functions that of Fort William and exercising within their respective jurisdictions the same powers under the same limitations. Sec. 37 Geo. III. C. 142; 39 and 40 Geo. III. C. 79, and 4 Geo. IV. C. 71.

In pursuance of the above Act, a Charter (14 Geo. III) known as the Charter of Justice, and dated March 26, 1774, was granted, under which the Supreme Court was established at Calcutta. We are here concerned only with its criminal jurisdiction. The 19th clause of the Charter declares that the Supreme Court shall also be a Court of Oyer and Terminer and Gaol Delivery in and for the town of Calcutta and factory of Fort William in Bengal and the limits thereof and the factories subordinate thereto; and shall have the like power and authority as Commissioners or Justices of Oyer and Terminer and Gaol Delivery have or may exercise in England, to enquire by the oaths of good and sufficient men, of all treasons, murders, and other felonies, forgeries, perjuries, trespasses and other crimes and misdemeanours committed within its jurisdiction; and for that purpose to issue their warrant or precept to the Sheriff commanding him to summon a convenient number of the principal inhabitants resident in the town of Calcutta and being British subjects, to attend as a Grand Jury or Inquest and present to the said Supreme Court such crime as should come to their knowledge to be tried there by Petit Jury; and for that purpose to issue their precepts to the Sheriff commanding him to summon a convenient number of such British subjects as aforesaid, to try the said indictment or inquest; that the Supreme Court shall proceed to hear, examine, try and determine the said indictment and offences and to give judgment thereon and award execution thereof, in such or the like manner or form, or as nearly as the condition and circumstances of the place and the persons will admit of, as the Courts of Oyer and Terminer and Gaol Delivery do or may in England; and that the Supreme Court shall have jurisdiction to try all offences as aforesaid committed by any subject of His Majesty or by any other person or persons who have been employed by or shall have been directly or indirectly in the service of the United Company or of any of His Majestys' subjects, and committed in the districts, provinces or countries called Bengal, Behar and Orissa; and in such cases it shall not be lawful for such offender to object to the locality of the jurisdiction of the Court, or the Grand and Petit Jury, but he shall be indicted, arraigned, tried, convicted and punished or acquitted and demeaned in all respects, as if the crime had been committed within the town of Calcutta, or factory of Fort William, or limits thereof. Important additions and alterations were subsequently made by the Stat. 21 Geo. III C. 70, Stat. 24 Geo. III C. 25, Stat. 26 Geo III C. 57 and Stat. 33 Geo. IV. C. 52. The 17th Section of the first of these Statutes reserved to Hindus and Mahomedans their respective laws of inheritance, succession and contract.

Thus the Supreme Court was established, deriving its powers and privileges directly from the Crown and independently of any control by the East India Company, and which with some minor alterations and with no modification in its status continued to administer justice till the year 1862, when it was replaced by the High Court established under Statute 24 and 25 Vic. C. 104 dated 6th Aug. 1861, under which also the High Courts at Madras, Bombay and Allahabad were established. In its criminal side it administered the criminal law as prevailed in England, both under the common law and the statute law, with its procedure of framing indictments by Grand Jury and of holding trials by Petty Jury. All indictable offences committed by any person within its local jurisdiction were triable before it with Jury and all such offences, committed by a British subject or his servants anywhere within the provinces of Bengal, Behar and Orissa, were also so triable.

In Madras and Bombay, Recorder's Courts were established in 1793 in place of the Mayor's Courts, consisting of a Recorder to be appointed by the Crown, the Mayor and three Aldermen, by 37 Geo. III. C. 142. They had civil, criminal, ecclesiastical and admiralty jurisdictions. Their jurisdictions extended over British subjects residing in the Company's respective possessions or within the territories of Native Princes in alliance with the Company's Government. The Recorder's Courts were also made Courts of Oyer and Terminer to administer criminal justice as in England or as nearly thereto as the condition and circumstances of the places and persons would admit, attention being had to the religion, manners and usages of the native inhabitants.

In pursuance of 39 and 40 Geo III C. 79 passed in the year 1800, a Supreme Court was established in Madras by Letters Patent dated the 26th of December 1800, consisting of a Chief Justice and two Puisne Judges, with full power to exercise such jurisdictions and powers as were possessed by the Supreme Court at Fort William in Bengal, within Fort St. George and the town of Madras and the limits thereof and the factories subordinate thereto and within the territories which were then or thereafter might be subject to or dependant upon the Government of Madras.

And in pursuance of Act. 4 Geo IV. C. 71 passed in the year 1823, a Supreme Court was established in Bombay by Letters Patent dated the 8th of December 1823, with like powers as possessed by the Supreme Court at Fort William in Bengal.

Thus all offences and misdemeanours, laid in the Supreme Courts of Calcutta, Madras and Bombay, were to be tried by Jury. By 7 Geo. IV. C. 37, passed on 5th May 1826, it was enacted that all good and sufficient persons resident within the limits of the several towns of Calcutta, Madras and Bombay, and not being the subjects of any Foreign State shall be deemed capable of serving as jurors; and that the Supreme Courts were to make rules as to qualification, appointment, form of summoning, challenging and serving of jurors and other regulations respecting thereto, subject to the approval of His Majesty. The provision that Grand Juries in all cases, and all juries for the trial of Christians, should consist of persons professing that religion, was repealed by 2 and 3 Will. IV, C 117, passed on 16th August 1832.

Statute 33 Geo. III C. 52, passed in 1793, authorised the Governor and Council of each of the three Presidencies to appoint Coroners to exercise and perform the powers and duties similar to those of the Coroners in England.

We have narrated the first efforts at the administration of English criminal law in India, mainly for the purpose of tracing the development of the system of Trial by Jury—one of its distinctive features—in India. Trial by Jury, in criminal cases, came to be held in some parts of India at very early periods of British Indian history, not through legislative enactments, but as the common law of the English nation which followed that nation wherever they resided for the purpose of trade, settlement or government. The several Charters only authorised the Company to establish competent Courts to hold those trials. And this will explain why two plans of administering justice, one for the Presidency towns and the other for the Muffasil, came to exist at first. It is natural to expect that in

the settlements which came to be founded by Englishmen and peopled by them, the rules of English law rather than those of the Native law, would come to exist and would continue to govern them as well as those Natives who came to reside under their protection with the progress of regular government under English authority, and the extensions of commerce and increase of English population at those particular settlements. But, in the territories outside Presidency towns but under the government of the Company, the administration of criminal justice was allowed to be continued according to the local or Native law for a long time, subject to such Regulations as were enacted by the Company's government in the interest of justice. Now, of course, under the authorities of the supreme Indian Legislature, one general and common course has been laid down or is being attempted to be laid down for administering justice, throughout India—adapting the modes of proceeding, as well as the rules of justice, to the various rights and diverse habits and customs of the people, including the European British subjects who reside in India. But it has taken a long time and enormous labour to come to this. For a considerable time during this long period Jury trial was confined only to trials before the Supreme Courts at the Presidency Towns. It has been gradually extended to the Muffasil, as we shall see in the next Chapter.

The proceedings taken for bringing up an offender for trial before the Supreme Court were, in those early days, briefly as follows :²²

The first proceedings taken were before a Justice of Peace either of his own motion or on complaint. He examined on oath the witnesses who speak to the committing of the offence, confined the offender in Gaol or in trivial cases released him on bail and then sent up to the Clerk of the Crown, an officer of the Supreme Court, all the examination and accounts in writing given by the witnesses. The Clerk of the Crown then drew up the formal charges or indictments, specifying in clear, exact and certain terms, the precise crime which might be gathered from those depositions to have been committed. The names of all the witnesses who could give an account of the matter charged were written on the back of the indictment ; and these witnesses were first sworn before the Judges of the Court to give true evidence to the Grand Jury upon the subject ; and then waited to be called in before that body for that purpose. It should be noted that any person, instead of going to a Justice of the Peace, was at liberty to take before the Grand Jury direct an indictment for the purpose of their inquiring into the offence charged therein,

The Grand Jurors were a body of the most respectable individuals resident within the jurisdiction of the Court, selected, upon the inquiry of the Sheriff in conjunction of the Clerk of the Crown, with reference to their station in society and their pecuniary circumstances, and entered by them accordingly in a list for the service in each current year, subject to the correction and sanction by the Judges. Out of this list, containing upwards of a hundred names, there were summoned to attend at each Sessions, or periodical meeting of the Crimi-

22. Taken from the Lectures of Mr. George Norton,
Advocate-General of Madras (1834).

nal Court, the number of 24, or more usually 23, to secure a majority of 12 ; for the Grand Jury could only act by a majority of 12 at least. The Judges of the Supreme Court appointed four periods in each year at which they assembled and held a Court for the purpose of hearing and determining the charges or indictments framed by the Grand Jury, or which might be framed then. The duties of the Grand Jury were mainly the examination of the charges brought before them and the evidence of the witnesses in support of them. But as their function was not to try the accused but only to inquire whether there were probable grounds for the charges made, they examined only the witnesses in support of the charge and not the evidence on both sides. The Grand Jury were presided over by a Judge who might instruct them whenever necessary, so as to guide them to perform their duties properly in sanctioning or rejecting the indictments sent for their investigation, such as relating to the admissibility of a certain piece of evidence or the ingredients necessary to frame a particular charge. After examining into the charges, the Grand Jury wrote on each indictment their finding, by the words "True bill" in case they were satisfied that it was well-founded, or by the words "Not a true bill" in case they rejected it. They then delivered the indictments back into the hands of the Clerk of the Crown in open Court, who read their finding to them aloud, so that there might be no error. The presiding Judge then discharged them with suitable thanks for their services to their country.

When the Grand Jury found a "True bill", the accused was called upon and the indictment was slowly read and explained or interpreted to him and in slighter kind of offences or as well as in cases of high treason he was at liberty to have a copy of the indictment on applying and paying for it, but in other cases free of charge. His plea or answer to the charge was then taken. If he pleaded "Guilty," the plea was written on the indictment and the Court had nothing further to do but to pass sentence. But if he pleaded "Not guilty," the Clerk of the Crown, recording that plea upon the indictment, addressed him the humane wish that "God would give him a safe deliverance" and then proceeded to call together the Jury, who, under the authority and guidance of the Judge, were to try and determine the guilt or innocence of the accused.

The list of names of the persons qualified to serve on this Jury, called *Petit* or Small Jury, to distinguish it from the Grand Jury, was prepared by the Sheriff in consultation with the Clerk of the Crown, and under the superintendence of the Judges, in the same way as the list of the Grand Jurors. At every Sessions, 36, according to turn, were summoned by the Sheriff to attend to the purpose of trying all the charges to be brought at that Sessions. In case it could be shown, however, that the Sheriff had summoned such persons as were particularly biased for or against the accused, the whole list of 36 might be set aside and a new list might be summoned of other persons. The names of the 36, each written in a slip of paper folded up, were then put into a box and shaken together, and the Clerk of the Crown drew out, at hazard one at a time, and called each such person to come forward to serve as a jurymen on that trial. Either side might object to the selection of a jurymen on the ground of his being a disgraced or infamous person, or on account of enmity or feeling of favour towards either the

accused or the prosecutor, and if the objection could be proved the jurymen would be set aside. The accused, moreover, in all serious offences, had the liberty to object to as many as twenty, one after the other as they were called, without giving any reason or shewing any cause at all. At last the Clerk of the Crown having called for the number 12 against whom no objection existed, and administered the solemn oath of their duty to them, the whole Jury were duly constituted. The trial commenced by the Clerk of the Crown reading at large to the Jury the indictment, informing them of the accused having referred himself to them as a Jury, to pronounce on his guilt or innocence, and directing to them to hearken to the evidence. If a Counsellor appeared for the prosecution, he then opened the case to the Jury, otherwise the presiding Judge called at once the witnesses and examined them one by one. After the witnesses were examined by the prosecuting Counsel or Court and cross-examined by the defence, and the evidence for the prosecution was thus closed, the accused was informed by the Judge that he was at liberty to say what he pleased on his own behalf. In cases of high treason as well as in the case of lighter offences, Counsellors of the accused were at liberty to address the Jury on behalf of the accused; but not in other cases of a serious nature. The accused then brought forward his own witnesses who were similarly examined and cross-examined. The Jury might put any questions through the Judge. When the case had been fully examined through the witnesses and the addresses on each side, the presiding Judge proceeded to sum up and explain the whole case, stating what in point of law, constituted the offence, pointing out what evidence applied to the charge made, and recapitulating it word by word, as far as it appeared necessary, in order that the Jury might be fully instructed and reminded of the nature of that testimony. It was the endeavour of the Judge to make the Jury fully comprehend what the case was before them and of what particulars, as matters of fact, they ought to be satisfied; but leaving altogether to their consciences and judgment, to be exercised upon a consideration of the proofs made, the duty of deciding whether the guilt charged was or was not established. The Jury then pronounced their verdict, either immediately or after retiring to a room by themselves for deliberation. The law required that they should be kept together without separation, and without food, fire or light, until they had *unanimously* agreed on what their verdict should be. If they could not come to a unanimous decision, in spite of long deliberation, the prisoner was discharged. If the unanimous verdict was "Not guilty" the accused was for ever released from any further charge of the crime for which he had been tried. If it was 'Guilty', then in all the more serious cases, the accused was sentenced to punishment as well as to forfeiture of all his property.

Such was the bare outline of the system of administering criminal justice according to the English laws, which is claimed by the Englishmen as the dearest of their birthrights. George Norton, once Advocate-General of Madras²³ expressed a hope that when the settlement of the administration of justice throughout this country would be so far advanced as that competent persons could be supplied to preside over and direct this system of trial by Jury,

23. In his lectures, 1834.

the system should be generally adopted, because this is the best and surest mode of introducing and establishing a personal interest among the people in the government and administration of justice in their own country. To quote his words.—“The likeliest source of attachment to the national institutions, and of the permanency of them, was the admission of the people at large to a share in their support.”

Grand Jury was abolished by S. 3, Act XIII of 1865.²⁴ An instructive account of the way in which the Grand Jury in England used to make presentment of a number of offences against one prisoner or against a number of prisoners will be found in the case of *Manu Miya*²⁵ in which authorities are cited. Although the Grand Jury remained in force till 1865, yet as a matter of fact very few prosecutions were started on their presentment in respect of cases arising in the Mofussil and triable by the Supreme Court and later on by the High Court, such cases generally coming before these Courts on commitments made by Magistrates.²⁶

24. See the Sections of the Act dealt with by Peacock C.J in *Nobodeep Chunder Gossamee* (1868) 15 W.R. 71, Footnote: 1 B.L.R.O.Cr.15.

25. (1882) 9C. 371.

26. See *Jackson* (1874) 22 W.R. 20.; 13 B.L.R. App. Cr 474.

CHAPTER VI.

Traces of the System of Trial by Jury in Pre-British Times in India.

It is not difficult to trace the Hindu Criminal Law back to the times of Gautama, Vasistha, Apastamba and Baudhayana in whose texts are to be found rules not very different from rules of criminal law, though in a somewhat rudimentary stage—it being sometimes difficult to distinguish between laws proper and rules of penance. When one comes to Manu one finds the criminal law at a fairly high state of development. The rigour of Manu's rules seems to have been softened to a certain extent by Vishnu. After Vishnu came Yajnavalka and Kautilya, the laws enunciated by whom are, on the whole, more comprehensive and less oppressive than those of Manu. Narada, Brihaspati and Katyayana represent a still later stage of development. Sir Henry Maine¹ speaking of the penal law of ancient communities says,—“The penal law of ancient communities is not the law of crimes, it is the law of wrongs or, to use the English technical word, of torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money damages if he succeeds”. Dr. Priya Nath Sen² has shown that these observations do not hold good in regard to the ancient Hindu Law. Says he,—

“It seems to me that in the Hindu Law punishment of crimes occupied a more prominent place than compensation for wrongs ; and the mere payment of compensation to the individual injured, when the injury inflicted was at all serious in its character, was seldom regarded as sufficient to meet the ends of justice ; of course, under certain circumstances the wrong-doer was compelled to compensate the person wronged, but the compensation was generally levied in addition to and not in substitution for the penalty which it was considered to be the duties of the King to impose. ‘A King,’ says Manu, ‘who punishes those who do not deserve to be condemned and fails to punish those who deserve punishment, becomes infamous and is ultimately doomed to hell.’ Neither theft, nor violence, nor any other form of serious injury to person or property could be condoned on mere payment of compensation to the party injured, but it was regarded as the duty of the King to punish the culprit for his offence against the law. It may, therefore, be safely pronounced that the penal law of the Hindus was the law of crimes in the strict sense, and the law of torts occupied a comparatively subordinate and less important position in that system. Then further, even apart from the nature of the penalty peculiar to the criminal law that was administered by the Hindus, there was another characteristic element in the procedure to be adopted in relation to a criminal act, which showed that the distinctive feature of a crime as opposed to a mere private injury was not at all lost sight of ; for we find that whereas it was generally directed that neither a

1. *Ancient Law*, 1927, p. 379

2. *Hindu Jurisprudence*, Tagore Law Lectures, 1909, pp. 335-337,

King nor his officers should foster litigation of their own accord but should ordinarily refuse to take cognizance of a cause of action without a complaint from a person aggrieved, yet cases of fraud and various other forms of crimes furnished exceptions to the general rule, for there it was directed that the King should take cognizance of them without a complaint; nay, the King was directed to employ officers to obtain information of crimes committed within his dominion and bring them to his notice to ensure the punishment of culprits. It is thus apparent from the above considerations that although our law-givers did not expressly say so, they condemned a crime, not so much because it involved an infringement of private rights, but because it imperilled the security and the tranquillity * * * of the peoples at large. The same act may be a tort as well as a crime."

In the Hindu theory of punishment the primary idea is that it would serve as a deterrent to others and so would operate as a preventive to recurrence of the crime; nextly, that it would serve as a corrective to the person who is punished and so dissuade him from behaving similarly again; and lastly, that it would serve as a means of purification, for in Hindu Law a crime is a sin and if the offender is punished by the King he is cleared of his sin and so purified. Dr. Nares Chandra Sen Gupta in his *Evolution of Law*³, has thus observed:—

"It is in the religious Code of Sin and Penance, which existed side by side with the reparatory Code of Civil law in primitive society that we have to seek for the roots of a law of Crimes * * In India we find that at quite an early age the King came in to assist the religious law and inflict punishment on offenders against religion and incidentally punished some violent wrongs. It seems probable that in India punishment of violent offences came into existence before Civil actions * * * In course of time Hindu law developed a philosophy of criminal justice which reveals the root of the criminal jurisdiction of the King in the religious law of penance. *Dharma* is the eternal order of things and regulates the whole world as well as the life of men. When a man commits sin he violates *dharma*. To adjust the equilibrium of *dharma* it appears in this world as *danda* or punishment. When a sinner gets his punishment from the King, his sin is wiped out just as much as it would be by penance * * * India never passed beyond this stage of dependence of law on religion".

Hindu law-givers did not draw any formal distinction between civil and criminal law, and the same Court was to administer both civil and criminal justice. It is apparent from Yajnavalkya and Narada that the incident of having justice administered by bodies or assemblies of men or with the assistance of assessors was a very common idea in the constitution of the Courts; e. g., *Pugah* or *Gamah* (assemblies of the people), *Srenāya* (corporations or guilds of merchants), *Culani* (gatherings or gens). In Brihaspati we find a distinction between the Chief Judge and the other Judges, the latter investigating into the case, and the former deciding it, while the King inflicts the punishment. And he also speaks of lesser offences being triable by "relatives, companies (of artisans), assemblies (of co-habitants) and other

3. Reprint, 1925, p. 78 et seq.

persons duly authorized by the King'. Sukra says that besides the King's Courts there were other subordinate Courts, e. g., families, corporations, associations of inhabitants and officers appointed by the King. And like Brihaspati, Sukra recommends that there should be three, five or seven assessors or judges who should preferably be natives of the place where the two parties reside.

It has not yet been ascertained how the system actually worked. Dr. Pramatha Nath Banerjea after considerable research has observed,—

"The Jury system, as it now prevails in the European countries, is somewhat different from what prevailed in Ancient India. The three or five members of the Judicial Assembly acted as jurors as well as Judges but the final decision rested with the Chief Justice.⁴ There is, however, one point on which we still require more light. It seems that besides the members of the Assembly, other persons present in Court were permitted, on certain occasions, to offer their opinions. Narada says, "whether authorized or unauthorized, one acquainted with the law shall give his opinion. He passes a divine sentence who acts up to the dictates of law". The Sukraniti quotes this passages with approval and adds: "Duly qualified merchants should be made hearers." The Sukraniti also quotes another passage from the Smritis, namely,—'Either the Court house should not be entered, or the right word should be said. The man, who does not speak or speaks unjustly, incurs sin.' The point is not clear and we wonder how the custom, if it existed at all, worked in practice."

Side by side with these Courts there existed in many places that machinery, namely an assembly of men, to whom disputes could be referred for decision or before whom cases of wrong could be brought for redress. In their origin, concept and character there were differences, but their function all over was more or less the same. Maine has said,⁵—

"India has nothing answering to the assembly of adult males which is so remarkable a feature of the ancient Teutonic groups, except the Council of Village Elders. It is not universally found. Villages frequently occur in which the affairs of the community are managed, its customs interpreted, and the disputes of its members decided by a single Headman, whose office is sometimes admittedly hereditary, but is sometimes described as elective, the choice being generally, however, in the last case confined in practice to the members of one particular family, with a strong preference for the eldest male of the kindred, if he be not specially disqualified. But I have good authority for saying that in those parts of India in which the village community is most perfect and in which there are the clearest signs of original proprietary equalities between all the families composing the group, the authority exercised elsewhere by the Headman is lodged with the Village Council. It is always viewed as a representative body and not as a body possessing inherent authority, and whatever be its real nature, it always bears a name which recalls its ancient constitution of Five persons".⁶

4. *Public Administration in Ancient India*, Chap. XII, P. 143.

5. *Village Communities*, 7th Edition. Pp. 122-123.

6. *Panchayat*.—Sir Frederick Pollock in his notes to Maine's *Ancient Law*, 1927, P. 316, observes, —"What is certain is that there is no such thing as the village community of Hindu times,

The basis of Mahomedan law, religious, civil and criminal, is the Koran, believed to be of divine origin and to have been revealed by an angel to Mahomet, who caused it to be written and published from time to time as occasion required, for the refutation of his opponents.⁷ Gibbons⁸ has said,—“In all religions the life of the founder supplies the silence of written revelations : the sayings of Mahomet were so many lessons of truth ; his actions, so many examples of virtue ; and the public and private memorials were preserved by his wives and companions”. Traditional law thus came into being, explained, commented on or supplemented by later jurists and sages. As far as may be gathered, nothing akin to the system of trial by Jury can be traced in Mahomedan criminal law. All that we find is that the Judge was sometimes assisted in his office by the Sahib-e-majlis (fit master of the assembly or foreman) i.e., associates of the Judges, whose judicial function it was to read aloud the depositions of the witnesses and to repeat the words of testimony verbally to the Judge.

We have in the previous Chapter dealt with the administration of Criminal Justice in the Presidency towns of Calcutta, Madras and Bombay which came into existence through the enterprise of the East India Company while carrying on their trade occupations. We shall now consider the effect of this administration on Criminal Justice outside those limits. We shall first deal with the case of Bengal, Behar and Orissa, because these territories were the first to come under British administration, as the result of the victory of the Battle of Plassey in 1757 and the grant of the Dewanny in respect of the said territories by the Moghul Emperor in 1765. Before doing so it will be convenient to have an idea of the legislative powers granted to the Company's Governors and their Councils.

Both Hindu and Mohomedan law are indissolubly united with religion, but there is this remarkable difference between the two :—The Hindus in consideration of this intimate union, hold that, even in a country governed by their own Princes, their own law, being the word of God addressed especially to the Hindu race, is not the law of the place, but the law of the Hindu inhabitants ; whereas, the Moslems hold that their law, being the word of God addressed generally to all mankind, is not only the *lex loci* of the countries subject to Muhammadan sovereigns, but ought to be law of the whole world. In accordance with this principle Moslems, departing from the international doctrine of Europe, hold that upon the

any more than there is any such thing as the village community of the Middle Ages in Europe. But there remains much profit to be derived from comparing the effects of more or less similar causes in fixing the customs of land-tenures in the East and the West, whether those effects are, as they sometimes are, closely similar or varied by the presence of other and different conditions. We no longer expect to find complete and parallel survivals of a common pre-historic stock of institutions, but it is no less interesting to find how easily parallel types may

be developed at very distant times and places ; and we are free to hold as a pious opinion that the Indian Village Council still known as the Five (panchayat)—though that has ceased to be the usual number in practice, and the institution belongs only to the “landlord” type of villages—may go back to the same origin as our own *reeve* and four men, who flourish in Canada to this day”.

7. See Sale's *Preliminary Discourse*, Chap. III.
8. *Decline and Fall of the Roman Empire*, Chap. L.

acquisition of any country by a Mahomedan Prince, their law becomes *lex loci*, not at the discretion of the Prince, but as matter of strict law and religion ; and also that their law, when it has been once introduced, can never be lawfully superseded by any other system⁹.

We have seen before that in the Charter of 1726, the Governors and Councils of Madras, Bombay and Fort William, respectively, were empowered with the sanction of the Court of Directors to make bye-laws, rules and ordinances for the good government of the several corporations thereby created and of the inhabitants of the said several towns, places and factories and to impose reasonable pains and penalties upon offenders against them. (Vide Chap. V. *ante*). Under Statute 13 Geo. III C. 63, commonly called the Regulating Act, passed in 1773, the constitution of the Government of India by the Company was placed on a centralized footing. By Clauses 7 and 8 of that Statute it was enacted that the Government of Bengal should consist of a Governor-General and four Councillors, a majority to decide ; and that the Presidents and Councils of Madras and Bombay should be subordinate to the Governor-General and Council of Bengal, who were thereby constituted the Supreme Government in India, subject, however, to the Court of Directors in England. And by Clause 36 of that Charter, the Governor-General and Council were empowered to make and issue such rules, ordinances and regulations for the good order and Civil Government of the Company's settlement at Fort William and other factories and places subordinate or to be subordinate thereto as shall be deemed just and reasonable, such rules, ordinances and regulations not being repugnant to the laws of the realm, and to set, impose, inflict and levy reasonable fines and forfeiture for the breach or non-observance of such rules, ordinances and regulations. Next, under Statute 21 Geo III C. 70, passed in 1781, by Clause 23, the Governor-General and Council was empowered to frame regulations for the Provincial Courts and Councils, with power reserved to the Sovereign in Council to disallow or amend such regulations. Next, under Statute 37 Geo III C. 142 passed in 1797, by Clause 8, the regulations passed by the Governor-General in Council previous to the passing of that statute were practically affirmed and they as well as all regulations that might be passed by that authority in future were ordered to be formed into a regular Code and printed with translations in the country languages, and it was declared that the Courts of Justice within the Provinces would be bound to regulate their decisions by the rules and ordinances which such regulations contained. In 1800, by Statute 39 and 40 Geo. III C. 79 S. 11, the Governor and Council of Fort St. George at Madras were invested with the same legislative power in respect of the territories subject to their Government as the Governor-General in Council had been given by any previous statute to frame Regulations for the Psesidency of Fort William. 47 Geo III C. 68, passed in 1807, empowered the Governor and Council of Fort St. George and Bombay respectively, to make and issue such rules and regulations for the good order and Civil Government of the towns of Madras and Bombay and of the Company's settlement at Fort St. George and Bombay and other factories subordinate thereto as the Governor-General in Council might make for the good order and Civil Government of Fort William. In 1813, Statute 53 Geo. III C. 155 also

9. *Naoroji v. Rogers* (1867) 4 Bom. H. C. R. I,

granted certain legislative powers on all the three Councils, notably providing that the several Governments of Fort William, Fort St. George, and Bombay were empowered in addition to making laws, regulations and articles of War for the native troops and holding of Courts-martial, to make any laws or regulations for the Government of the natives of the several territories subject to the said Presidencies respectively, notwithstanding anything to the contrary contained in any Act of Parliament or other matter or thing.

Referring to the above sources from which the legislative powers of the Councils were derived and also to such legislative powers as were exercised on the presumption that such powers existed, Mr. Cowell¹⁰ has classified the Statute law which came into existence prior to 1834 into five categories. He has said,—

“Thus from time to time the legislative powers of the Councils were developed ; and in pursuance of those powers they enacted laws and regulations till 1834. Down to that date, which is the important epoch in the history of Indian legislation, there were five different bodies of Statute law in force in the empire. *First*, there was the whole body of English statute law existing in 1726, so far as it was applicable, which was introduced by the Charter of George I. and which applied, at least, in the Presidency Towns. *Secondly*, all the English Acts subsequent to that date which are expressly extended to any part of India. *Thirdly*, the Regulations of the Governor-General’s Council, which commence with the Revised Code of 1793, containing 48 Regulations, all passed on the same day (which embraced the results of twelve years’ antecedent legislation), and were continued down to the year 1834. They only had force in the territories within the Presidency of Bengal. *Fourthly*, the Regulations of the Madras Council, which spread over the period of thirty two years, viz. from 1802 to 1834 and were in force in the Presidency of Fort St. George. *Fifthly*, the Regulations of the Bombay Code, which began with the Revised Code of Mr. Mountstuart Elphinstone in 1827, comprising the results of twenty-eight years’ previous legislation, and were also continued till 1834, having force and validity in the Presidency of Fort St. David”.

The Courts established by the East India Company, throughout their territorial possessions in Bengal, Behar and Orissa were required in the administration of Criminal Justice to be guided by the Mahomedan law, except where a deviation from it may have been expressly made by the Regulations that were enacted by the Governor-General in Council. Instead of abrogating the Mahomedan Criminal Law, a critical analysis of which reveals innumerable points which to Englishmen, brought up amidst principles of Legislation and Government far more advanced, must have appeared as ill-suited and deserving of improvement, the Company’s representatives proceeded on the more statesman-like track of preserving as much of the existing materials as they possibly could and changing only those parts which could not possibly be tolerated. The machinery for the administration of criminal justice was one to which the people had been accustomed for quite a long time. For some years after the grant of the Dewanny¹¹, this machinery was not changed, the administration of criminal

10. *Courts and Legislative Authorities in India*, 6th Edn.—P. 73.

11. Lord Clive secured the Empire of India for

his country by obtaining the grant of the Dewanny for the East India Company from the then Moghul Emperor. Previously to this

justice being left, as before, to the Nazim ; the Company's servants only exerting such influence as was considered necessary to remedy such deficiencies as appeared in specific cases.

The rise, progress and gradual improvements of the Penal system of Indian Government has been described in considerable detail in Beaufort's Digest of Criminal Law¹². The following is an extract from that book :-

"On the Company's first acquisition of the Dewanny it was deemed advisable to interfere but little with the existing system. Instead of abrogating the Mohomedan criminal law by substituting a new code founded on European experience and providing Courts with progressive degrees of power, in which the fear of detection stimulates inertness and overawes injustice, instead of immediately subverting the existing system and destroying the old establishments, because they were not based on the principles familiar to the conquerors, or because their functions were ill-discharged, it was wisely determined to introduce caution and due circumspection.¹³ The administration of criminal justice was therefore left to the tribunals previously constituted. Those entrusted with the duties which are now within the cognizance of our judicial duties are thus enumerated in the report of the Committee of Circuit¹⁴. The Nazim, as supreme Magistrate, presides personally in the trial of capital offenders ; the Deputy of the Nazim takes cognizance of quarrels, affrays and abusive names ; the Fouzdar

the Nawab Najim-ul-Daulah, on his accession to the Masnad of Bengal after the death of his father Nur Jafar Ally Khan had entrusted the Subahdari to the management of a Naib, or Deputy, to be appointed on the advice and recommendation of the English ; but the Firman which conferred in perpetuity the Dewanny authority over the Provinces of Bengal, Bihar and Orissa on the East India Company constituted them the master and virtual sovereign of those Provinces,—the office of the Dewan implying not merely the collection of the revenue, but the administration of civil justice. This Firman was granted on the 12th of August 1765 and was accompanied by an imperial confirmation of all the territories previously held by the East India Company under grants from Kasim Ally Khan and Jafar Ally Khan within the nominal limits of the Moghul Empire. The Nizamut or administration of criminal justice was, at the same time, conferred upon the Nawab Najm-ul-Daulah. The Dewanny was further recognised by an agreement dated the 30th of September of the same year by the Nawab, who formally accepted his dependent situation by consenting to receive a fixed stipend of fifty-three lakhs

of rupees for the support of the Nizamut and for the maintenance of his household and his personal expenses.—*Sir C. C. Ghose's Presidential Address at the Asiatic Society of Bengal, 1933.*

For a short account of the gradual establishment of the British authority commencing from 1640, when two ships from England to Bengal opened the trade of the London East India Company to this part of India under a patent for exemption from customs obtained from the Emperor Shah Jehan, until the 30th September 1765 when the Nawab Nazim of Bengal became virtually a pensioner of State retaining the name and only in some measure the dignities of his office, See Harington's Analysis Vol. 1, Pp. 2-6.

12. (1860) P. 3, *et seq.*

13. Burke in his *Reflections on the French Revolution* has said :—"A true politician always considers how he shall make the most of the existing materials of his country. A disposition to preserve and an ability to improve, taken together, would be my standard of a statesman".

14. *Vide, infra.*

is the officer of Police, the judge of all crimes not capital,—the proofs of these last are taken before him and reported to the Nazim for his judgment and sentence upon them ; the *Mohtesil* has cognizance of drunkenness and of the vending of spirituous liquors and intoxicating drugs, and the examination of false weights and measures ; and the *Cotwal* is the peace-officer of the night, dependant on the Foudaree.

“But it would appear that the officers here enumerated were confined to the capital ; for, beyond its precincts, the Zemindar, who was originally the Chief fiscal officer of a District, exercised both a civil and a criminal jurisdiction, almost supreme within the territory, of which he was appointed to preside. The minor offences he visited with fines, imprisonment, or corporal punishment according to his individual pleasure or sense of justice ; and even in capital cases he was under no further restraint than that of execution. The government but rarely interfered with his decisions. Thus it ever is with despotic governments : they do not interpose between the officers and their subjects ; they do not understand the right of the individual as opposed to the general order of the State ; their agents are entrusted with unlimited powers and in the exercise of them they are left unrestrained. The difference between a despotic and a just government lies in this that the one revenges, the other punishes ; the one asserts its powers with passion, the other calmly vindicates its authority ; the former, unembarrassed with scruples, is content to believe that the real offender is among those who suffer ; the latter is ever filled with a tender apprehension lest the safety of the innocent should be endangered and lest the powers appointed to protect the people should be perverted to oppress them * * * * The British Government, therefore, commenced by providing means for superintending the native tribunals. In August 1769, certain servants of the Company, under the title of Supervisors, were stationed in appropriate districts throughout the country with this intent ; and in the next year two Councils, with authority over the Supervisors, were stationed, one at Moorshedabad and another at Patna.”

The Supervisors were furnished with detailed instructions “to ascertain in a minute, clear and comprehensive manner” a variety of things, amongst which was the following :—“Whatever might tend to obtain knowledge of actual abuses and promote a reform of them in the administration of justice”. In 1770, a severe famine, which was computed to have destroyed a third of the inhabitants, raged in Bengal. Notwithstanding this mortality and the consequent decrease of cultivation the net collection of revenue in the year succeeding the famine exceeded not only that made in the year of the famine but also of the year preceding the same.

Since the acquisition of the Dewanny in 1765, the Court of Directors were all along watching the result of the reforms they had been introducing, and did not think of effecting any radical change, because it “was not judged advisable either by the local government or by the Court of Directors and perhaps was not practicable in the actual state of the Company's service at the time of their acquisition of the Dewanny, to vest the immediate administration of the revenue or of civil and criminal justice in European officers.” In 1771, the Court of Directors declared their resolution “to stand forth as Dewan and by the agency of the

Company's servants to take upon themselves the entire care and management of the revenues"¹⁵. As Cowell¹⁶ has observed,—

"This involved the entire remodelling of rights of property in the soil and the assumption of the administration of justice. It expressed the policy which had already been determined upon, viz., to abandon the government through the Nabob's officials subjects to European supervision and to transfer to the Company's servants the direct discharge of the duties of administration."

Early in 1772, Warren Hastings landed in Bengal, having been transferred to that place from Madras by the Court of Directors. In order to carry their determination into effect, the Court of Directors appointed a Committee of Circuit, consisting of the Governor and four members of Council; and Warren Hastings drew up a Report comprising plans for the more effective collection of revenue and administration of justice. Certain judicial regulations were proposed by the Committee of Circuit on the 15th August, 1772 and were adopted by the President and Council on the 21st of that month. In the report the following was stated:—

"We have confined ourselves, with a scrupulous exactness, to the constitutional forms of judicature already established in this Province, which are not only such as we think are themselves best calculated for expediting the course of justice, but such as are best adapted to the understanding of the people; where we shall appear to have deviated, in any respect, from the known forms, our intention has been to recur to the original principles and to give them that efficacy, of which they were deprived by venal and arbitrary innovations, by partial immunities granted as a relief against the general and allowed abuse of authority, or by some radical defect in the constitution of the Courts in being".

In the letter dated 3rd November, 1772, to which reference has already been made, the President in Council thus described the existing condition and the nature of the reforms they had undertaken¹⁷:

"The administration of justice has so intimate a connection with revenue that we cannot omit the mention of it while we are treating of this subject in a general view,—although we have already given our sentiments upon it at large in another place, to which we shall crave leave to refer. The security of private property is the greatest encouragement to industry, on which the wealth of every State depends. The limitation of the powers annexed to the magistracy, the suppression of every usurpation of them by private authority, and the facilitating of the access to justice, were the only means by which such a security could be obtained; but this was impossible under the circumstances which had hitherto prevailed. While the Nizamut and the Dewanny were in different hands, and all the rights of the former were admitted, the

15. This resolution was communicated by the Court of Directors by their general letter dated the 28th August, 1771. See Harington's Analysis, Vol. II. p. 11.

15. *Courts and Legislative Authorities in British India*, 6th Edn. P. 30.

17. Harington's Analysis, Vol II-Pp. 10-11.

courts of justice which were the sole province of the Nazim, though constituted for the general relief of the subjects, could receive no reformation. The Courts and officers of the Nizamut were continued, but their efficacy was destroyed by the ruling influence of the Dewanny. The regular course of justice was everywhere suspended ; but every man exercised it who had the power of compelling others to submit to his decisions. The people were oppressed ; they were discouraged and disabled from improving the culture of their lands ; and in proportion as they had the demands of individuals to gratify, they were prevented from discharging what was legally due to Government. Such was the state of the revenue when your commands were received by the lapwing and happily removed the difficulties which had hitherto opposed the introduction of a more perfect system by abolishing the office of Naib Dewan and authorizing your administration to assume openly the management of the Dewanny in your name, without any foreign intervention. In the execution of these your intentions the points which claimed our special attention, as will appear by the above description, were to render the accounts of the revenue simple and intelligible ; to establish fixed rules for their collections ; to make the mode of them uniform in all parts of the province, and to provide for an equal administration of justice".

An outline of the machinery, as prescribed by these regulations, may be gathered from the following extract from Beaufort's Criminal Law :—¹⁸

"By this scheme a Court of criminal judicature was established in each district under the denomination of Foujdari Adawlut, in which a Kazee and Mooftie, with the assistance of two Moulavies as expounders of the law, were appointed to hold "all trials of murder, robbery and theft and all other felonies ; forgery, perjury and all sorts of misdemeanours, assaults, frays, quarrels and adultery and every other breach of the peace, or violent invasion of property"; and it was declared to be the duty of the Collector of the District (he being a covenanted servant of the Company) "to attend to the proceedings of this Court so far as to see that all necessary evidences are summoned and examined ; that due weight is allowed to their testimony ; and that the decision passed is fair and impartial according to the proof exhibited in the course of the trial ; and that no causes be heard or determined but in the open Court regularly assembled". A separate and superior court of criminal jurisdiction was at the same time established at Moorshedabad, under the designation of Nizamut Sudder Adawlut, in which was to preside, by the title of Daroga, a Chief officer appointed on the part of the Nazim, assisted by the Chief Kazee, the Chief Mooftie and three capable Moulavies whose duty it was declared to be "to revise all the proceedings of the Foujdari Adawlut ; and in capital cases, by signifying their approbation or disapprobation thereof, with their reasons at large, to prepare the sentence for the warrant of the Nazim. A control over the proceedings of this Court, similar to that which the Collectors of revenue were empowered to exercise over the provincial Courts, was vested in the Committee of Revenue at Moorshedabad, and

18. Pp. 5-6. See also Cowell's *Courts and Legislative Authorities in British India* 6th Edn. Pp. 31, *et seq.*

the object of such control was stated to be "that the Company's administration, in the character of King's Dewan, may be satisfied, that the degrees of justice, on which the welfare and safety of the country so materially depend, are not injured or perverted by the effects of partiality or corruption".

The Sudder Nizamut Adawlut established at Moorshedabad as aforesaid, was soon after transferred to Calcutta to be more immediately under the superintendence of the President and Council ; and the Committee aforesaid, apparently, was about the same time abolished. Warren Hastings, who presided over the Court for a short time, found that the work imposed a labour and involved a responsibility which it was inconvenient for him to sustain. In October 1775, therefore, the Sudder Nizamut Adawlut was removed back to Moorshedabad and the uncontrolled administration of criminal justice was confided to the Naib Nazim by whom Foudjars, assisted by persons versed in the Mahomedan Law, were appointed to superintend the Criminal Courts in the several districts, and to apprehend and bring to trial offenders against the public peace. These arrangements for the administration remained in force, with scarcely any change down to 1780, except for some changes introduced in the Police system. In 1781, it having been found that the then existing Police establishments, as institutions for the detection of crimes and for the apprehension of offenders, were not working well, the English Judges of the several Civil Courts, being Company's covenanted servants, were invested with the power, as Magistrates, of apprehending dacoits and persons charged with the commission of any crimes or acts of violence within their respective jurisdictions. They were not however empowered to try or punish such persons, nor to detain them in confinement ; but they were to send them immediately to the Daroga of the nearest Foudjaree Court with a charge in writing, setting out the grounds on which they had been apprehended. At the same time, provision was made, investing, with the permission of the Governor-General and Council, certain Zemindars with Police powers, such as they had enjoyed under the Moghul Government. And a special Department was created with an officer at its head under the designation of Remembrancer of Criminal Courts,¹⁹ to receive periodical reports and returns from the Judges, Zemindars and the Nazim, containing details as to apprehension and trial of persons within their respective jurisdictions, and so keep a check on the administration of criminal justice. These provisions too proved ineffectual and generated an evil of a new description : having no power of trial, the European Magistrates could only make over the persons apprehended to the Darogas of the Foudjari Courts, where many such persons were detained without trial for trivial offences for periods wholly disproportionate to the gravity of their crimes.

In 1784, Parliament passed an Act, (24 Geo III. C. 25) which is the origin of the present mode of conducting the Home Government of India. The Act was intituled, "An Act for the better regulation and management of the affairs of the East India Company and of the British Possessions in India ; and for establishing a Court of Judicature for the more speedy

19. For a history of the office of Superintendent and Remembrancer of Legal Affairs, see notes

under heading "Legal Remembrancer" in Pt. II. ch. I. *post*.

and effectual trial of persons accused of offences committed in the East Indies." The Marquis of Cornwallis was selected to superintend the measures determined upon in pursuance of the said Act ; and in 1786, he was sent out to India as Governor-General with detailed instructions from the Court of Directors, stating "that they had been actuated by necessity to accommodating their views and interests to the subsisting manners and usages of the people, rather than by any abstract theories drawn from other countries or applicable to a different state of things." In June 1787, a new Regulation, "for the administration of justice in the Criminal Courts in Bengal, Bihar and Orissa" was passed by the Governor-General in Council, and at the same time the office of Judge, Collector and Magistrate (except in the cities of Dacca, Moorshedabad and Patna) were united in the same person, but under distinct rules for his guidance in each capacity. One of the changes²⁰ thus introduced was that the Magistrates were invested with power to hear and determine without any reference to the Fouzdar's Courts all complaints or prosecutions brought before them for petty offences, such as abusive language or calumny, inconsiderable assaults or affrays, and to punish the same, when proved, by corporal punishment not exceeding 15 ratans, or imprisonment not exceeding 15 days ; but in all cases affecting life or limb of the accused or subjecting them to any greater punishment the case was to be sent up to the Fouzdari Court on a written charge ; and the Daroga of the Fouzdari Court was to remain independent of the Magistrate and subject in every respect to the Naib Nazim, by whom he was to be appointed. Another important declaration was made in the Regulation that "All Europeans, not British subjects, were equally amenable with the natives to the authority of the Magistrate within his own district and to the Fouzdari Court to which he might be committed." These measures, though they obviated to some extent the hardships and inconveniences which had been experienced before as regards petty offences, did not go any great way to make any improvement, because the sentences of the Sudder Nizamut Adawlut remained final and were not communicated to the Governor-General until they had been executed, and the defects in the Mahomedan law under which the cases were dealt with remained present ; and the control of the criminal administration being with the Naib Nazim and the officers appointed by him, the abuses were left unremedied.

Lord Cornwallis, convinced of the inefficacy of the different plans that had been adopted since 1772, determined to introduce an entirely different system and to take into his own hands the superintendence and administration of criminal justice throughout the Provinces. In a Minute, recorded by him on the 1st December 1790, he pointed out that there were two inherent defects in the system of administration of criminal law ; viz, *first*, that the Mahomedan law itself was grossly defective ; and *secondly*, that there were defects also in the constitution of the Courts established for the trial of offenders. So far as the first of these items is concerned, he expressed the view that enough had gone before from which it could be gathered that the

20. For a more elaborate summary of the said Regulation, see Beaufort's *Digest of Criminal Law*, p. 8.

Government had the right to alter the Mahomedan law itself in respect of crimes, and he set about formulating some changes. And as regards the second item, he resolved to start a new machinery which would enable the Government itself to exercise the necessary control ; because, as he said, "it was essential for the prevention of crimes, not only that offenders should be deprived of the means of eluding pursuit of the officers of justice but that they should be speedily and impartially tried when apprehended. Accordingly, on the 3rd December 1790 a new Regulation was passed.

By this Regulation the Court of the Nizamut Adawlut was again removed from Moorshedabad to Calcutta, the duties of the Court being undertaken by the Governor-General and the Members of the Supreme Council, assisted by the Kazi-al-Kuzat or local Kazi of Bengal, Behar, and Orissa, and two Muftis. And four Courts of Circuit, superintended by two covenanted civil servants of the Company and each having a Kazi and a Mufti to expound the law were established for trial of offences not punishable by the Magistrates. Thus Judges of Circuit were appointed to the duties hitherto performed by the Fouzdar darogas, and the place of the Naib Nazim was taken by the Governor-General and Council. The Regulation thus enacted remained in force, with a few additions and alterations, until in 1793 Lord Cornwallis introduced his Regulations of that year.

The history of criminal administration from 1772 to 1793 given above was succinctly set out in Section 1 of Reg. IX of 1793, and at the end of that Section, after referring to the Regulations passed on the 3rd December 1790, it was stated that "those Regulations, with the subsequent amendments, are now re-enacted with further alterations and modifications". The whole system then to be in force was codified, the Regulation being headed,—“A Regulation for re-enacting, with alterations and modifications, the Regulations passed by the Governor-General in Council on the 3rd December 1790 and subsequent dates, for the trial of persons charged with crimes and misdemeanours.” It consisted of seventy-nine sections. This very comprehensive Regulation contained the fundamental rules for the administration of Criminal law in the successive stages from the first apprehension to the final disposal of accused persons.²¹

Great changes were wrought by successive enactments on most of the points dealt with by this Regulation. Up to the introduction of the Code of Criminal Procedure in 1861,—stated generally,—the changes effected by the later Regulations were as follows :—

The office of Magistrate was transferred from the Judge to the Collector of the District by Reg. XVI of 1810 and IV of 1821 ; the powers of the Magistrate to try and punish offenders were considerably enlarged by Reg. IX of 1807, XII of 1818, and VII of 1819 ; the power to punish offenders was conferred on certain officers by Reg. III of 1821 and Act XV

of 1843 ; Courts of Circuit were abolished, their powers having been first transferred to Commissioners of Circuit and then to Session Judges under Reg. I of 1829 and Act VII of 1835 ; the Mahomedan Law was in many and very important respects modified by Reg. IV and XIV of 1797, VIII of 1799, VIII of 1801 and LIII of 1803 ; the requisition of futwa was in many cases dispensed with under Reg. I of 1810, Act XXX of 1836, Act XXIV of 1853 and Act XI of 1848 ; persons not Mahomedan were entitled to be exempt from its operations by Reg. VI of 1832 ; and corporal punishment was abolished by Reg. II of 1834.—Clarke's Regulations, Vol. I. p. 85

As regards the state of the Criminal administration in other provinces, that is to say beyond the province of Bengal, Behar and Orissa to which Reg. IX of 1793 applied, the Regulations of 1793 gradually came to be introduced, subject to such modifications as became necessary by reason of local conditions ; and the system, as a system, became more or less the same everywhere in the territories over which the British rule extended. ²²

We shall now trace the history of introduction of the Jury system in Criminal trials in British India outside the Presidency towns.

22. For a detailed history as regards different provinces, see Beaufort's *Criminal Digest* Pp. 11-14.

CHAPTER VII.

Extension of the System of Trial by Jury outside the Presidency Towns.

The earliest reference that one has as regards the introduction of Trial by Jury in the Provincial Criminal Courts dates back to the year 1827.

Before that year a system of disposal of disputes by panchayets was recognized in the Regulations of the Madras Presidency. In that Presidency, besides Courts of superior grades, each village had a village-court presided over by the head-man of the village, usually known by the designation of Potal or Potel, entrusted with the power of trying all causes for matters of mere debts or contracts to the amount of Rs. 10 in value, and also for matters to the amount of Rs. 100 in case both parties chose to submit such cause for their decision; and from this decision there was no appeal, as, in such small concerns, the evils of appeal would necessarily be greater than the loss of the whole matter in dispute. The Regulations also recognized trials of causes by Panchayets, their number ranging from five to nine, with none to preside over their deliberations, and the decisions of the majority prevailing; the decisions were not open to appeal; and it was provided that it was the duty of the Zilla Judges to see that the decisions were put into execution. It is evident that the principles of this mode of trial in civil cases were analogous to these of a trial by Jury in criminal cases. In 1802, a system of administration of criminal justice was introduced in the Presidency of Madras, during the Government of Lord Clive's son, framed upon the system which prevailed in Bengal: Magistrates and Assistant Magistrates were appointed with power to apprehend offenders and bring to trial those in petty cases, and four Courts of Circuit were established and also a Chief Criminal Court consisting of the Governor in Council.¹ The system, so introduced, was later on modified and altered.

In 1825, Sir Thomas Munro, the then Governor of Madras, wrote a Minute, advocating the introduction of Jury system as a normal mode of trial in all criminal cases, in which he said,—

"As far as success in the proposed plan may depend upon the qualifications of the Natives, we have the strongest reason to expect it; for, having been in former times and still being in the present, accustomed to sit on panchayets, they are, in general, sufficiently expert in examining and weighing evidence."

By one of the Regulations passed in 1827, viz. Reg. X of 1827, it was ordered that Trial by Jury was to be gradually introduced. The first Section of this Regulation provided that the Government had deemed it expedient to introduce the system of trial by Jury in order to expedite criminal trials and to raise the character of the people and to

1. Cowell's *Courts and Legislative Authorities*
in *British India*, 6th Edn., P. 198.

facilitate the training of facts from the evidence by the extended employment of the Natives of India in the administration of criminal justice. The Regulation provided that the constitution of a Madras Moffussil Jury should be as under :—Persons between the ages of 25 and 60 shall be eligible to serve as jurors ; Fakirs, Gooroos, Priests and Pois shall be exempted ; as many as 30 and more (up to 72) jurors shall be summoned, out of whom from 8 to 12 persons should be chosen by lot. It was provided that the jurors were to be paid a rupee a day from their arrival in Court till their discharge, *plus* for the days required for travelling both ways, to the Court and back home,—15 miles a day being considered the travelling rate. The provision further was that the jurors were to take an oath that they would be guided solely by the dictates of their conscience and by the evidence before them. It was also provided that the verdict accepted was that of the three-fourths of the Jury. In 1845, the Madras Courts of Circuit were abolished and the Judges of the Zilla Courts were directed to hold permanent sessions of trial of persons accused of crimes, formerly triable by the said Circuit Courts. In the meantime Act VII of 1843 was passed, by which it was provided that the Judges might avail themselves of the aid of respectable Natives, “by constituting them Assessors or members of the Court, with a view to benefit by their observations, particularly in the examination of witnesses, or by the employing of them more nearly as a Jury, to attend during the trial, to suggest points of inquiry and after consultation to deliver their verdict”.

With regard the Presidency of Bombay the Governor-General in Council in 1797 authorised the local Government to establish Courts of civil and criminal Judicature in the Western Presidency, on principles similar to those on which the Courts in the Bengal Presidency had been established. Mahomedan Criminal law did not generally prevail in that Presidency ; the Hindus being tried by their own criminal law, and Parsis and Christians by English criminal law². In 1673-74 Governor Aungier, in pursuance of the suggestion of the Company in their Despatch of 10th March, 1669, established what may be called Courts of Panchayets i. e., community or caste representatives, restricting their judicial powers to the decision of cases amongst persons of their own castes who agreed to submit controversies to their arbitration. He also conferred on them Police powers of a wide nature. He also exempted the members of a Panchayet from “arrests in suits of law” and directed that whoever shall offer them any public affront or injury shall be severely chastised³. The Panchayets had, amongst other duties, to look after the estates of orphans belonging to their respective caste or community⁴. In 1799, Duncan, the then Governor of Bombay, established a number of Courts and introduced a Code of Regulations for the administration of justice in civil and criminal cases. In 1827, a Code was passed by Elphinstone, Governor of Bombay, revising the former Regulations and declaring that for the well-being of the subjects of the State it was necessary to make known to them the rules and principles on which administration of justice was to be carried on. By Reg. XIII of 1827, the criminal Courts were allowed the assistance of a body of Natives who

2. Ibid, P. 199.

4. Ibid, P. 155.

3. Fawcett's *The First Century of British Justice in India*, pp. 81-82.

were known to the Judges as respectable and leading citizens ; this body was termed the Panchayet or the Assessors or "more nearly a Jury".

In 1831, a very largely and influentially signed petition was presented from this country to the House of Commons in favour of the introduction of the system of trial by Jury. One result of that was that, as regards Bengal, Regulation VI of 1832 was enacted, which introduced the system, though in a modified form from that in Madras. From 1793 to 1832 the procedure that obtained in criminal trials was that in all cases in which a Mahomedan was to be tried and in all other cases in which an exception had not been made by the executive Government, the Court received the assistance of a duly appointed law-officer who expressed his opinion on the point at issue from a religious point of view or who declared what the futwa demanded. The law professedly administered was the Mahomedan law as amended and modified by the Regulations. Where the amendments were applicable there was no difficulty in disposing of trials ; but in the contrary event, an exposition of the Mahomedan law was necessary to pronounce whether the act of the prisoner was punishable or otherwise. Reg. VI of 1832 provided an important departure and the following points, gleaned therefrom, show some of the material aspects thereof⁵ :—

(a) "It is competent to any Court of criminal justice, in which a Commissioner of circuit or Judge of sessions presides without the necessities of any special authority from Government, to avail itself of the assistance of respectable natives in either of the three following ways :—

First,—By referring the case, or any point or points in the same, to a Panchayet of such persons, who are to carry on their enquiries apart from the Court, and report to it the result. The reference to the Panchayet and its answer are to be in writing and are to be filed in the case.

Secondly,—By constituting two or more such persons assessors or members of the Court, with a view to the advantages derivable from their observations, particularly in the examination of witnesses. The opinion of each assessor is to be given separately and discussed ; and if any of the assessors or the authority presiding in the Court desires it, the opinions of the assessors are to be recorded in writing in the case.

Or *Thirdly*,—By employing them more nearly as Jury. They are then to attend during the trial of the case ; to suggest, as it proceeds, such points of enquiry as occur to them, and the Court, if no objection exists, using every endeavour to procure the required information ; and after consultation to deliver in their verdict. The mode of selecting the jurors, the number to be employed and the manner in which their verdict is to be delivered, are left to the Judge who presides. In all trials in which recourse is had to the above provisions the futwa of the Mahomedan law-officer is unnecessary, and may be dispensed with

5. See Beaufort's *Digest of Criminal Law*, pp. 228-229.

at the option of the Court. Provided that whenever the futwa is dispensed with, and the crime of which the prisoner is convicted be one, which the Judge is not specifically empowered by the Regulations to punish, he is not to proceed to pass sentence, but is to refer the case for the consideration of the Nizamut Adawlut, stating at length in the proceeding the opinion of the Panchayet, assessors or Jury and his own opinion as to the crime proved, and the nature and extent of the punishment to be awarded.

(b) Under all the modes of procedure prescribed above the decision is vested exclusively in the officer presiding in the Court, provided that the sentence should be one which, under the existing regulations, it is within his competency to pass.

(c) The condition of reference to the Nizamut Adawlut, set forth above, relates only to the nature of the crime, that is to say that the presiding officer in the Court can refer only such crimes which are not defined or specified by the Regulations as being offences punishable by the criminal Courts.

(d) Any person not professing the Mahomedan faith when brought to trial on a commitment for an offence under the general regulations may claim to be excepted from trial under the provisions of the Mahomedan criminal Code, and in such a case the presiding officer in the Court shall comply with the requisition and shall proceed in one of the three modes specified above, at the same time dispensing with the futwa.

(e) Trial, in which the religious prejudices of Mahomedans or any other class are concerned, ought in all possible cases to be conducted without the Mahomedan law-officer and with the assistance of a Jury under the above provisions. A futwa on any point of Mahomedan law may, if necessary, be required without the attendance of the law-officer on the trial.

(f) If the presiding officer in the Court differs from the Jury or the assessors it is not necessary for him to refer the case to the Nizamut Adawlut but he could pass such order as was within his own competency.

This would be a convenient place to state that the general exemption which European British subjects enjoyed from the jurisdiction of the Provincial Courts established by the Company was continued and the powers of the Supreme Courts derived from their Charters and from analogy to those of the Courts of Queen's Bench were retained; but all Europeans, not British subjects, were amenable to the authority of the Magistrates and Sessions Courts within whose jurisdictions they were apprehended and brought to trial, in common with the Natives of the country. In 1849 the Government having felt the inconvenience of having to bring up before the Supreme Courts European British subjects accused of offences committed in the Mofussil, from great distances, intended to remedy the difficulties necessitated in procuring evidence from distant quarters and proposed to empower Mofussil Courts to try them with the aid of a Jury. They consequently introduced two Bills, one, intituled "An Act for Trial by Jury", and the other "An Act for abolishing exemption from the Jurisdiction of the East India Company's Criminal Courts." These Bills will now be reproduced :—

ACT NO. OF 1849.

AN ACT FOR TRIAL BY JURY.

Whereas the laws in force for trial by Jury in certain cases require to be amended and made the same throughout British India, it is enacted as follows :—

I. Regulation X of 1827 of the Madras Code, Sections IV, V and VI of Regulation VI, 1832 of the Bengal Code, and Section XXXII of Act VII. 1843 are repealed ; but this repeal shall not affect the validity of any proceedings taken in any Court under the repealed Sections before the arrival of a copy of this Act at the Sudder Station, where such Court is held, or any proceedings which may be depending before such Court.

II. Every person who at the time of his committal for trial before a Sessions Judge claims to be tried by a Jury shall be entitled to be tried under this Act.

III. All persons of reputed intelligence, respectability and consideration, between the ages of twenty-five and fifty years are qualified to serve on juries.

IV. All qualified persons are liable to serve on juries unless included in any of the classes following, that is to say,—

First—Judges, Magistrates and other judicial officers, Law officers, Vakeels, officers and servants of the Courts of Justice.

Second—Commissioners, Collectors, Deputy Collectors and other persons in the Revenue service.

Third—Postmasters and persons in the service of the Post office.

Fourth—Officers and others in the Military service of Her Majesty or the East India Company.

Fifth—Surgeons and others, who openly and constantly practice in the profession of Physic.

Sixth—Chaplains, priests and others employed in religious offices.

Seventh—Principals, professors and teachers of any Government College or School.

Eighth—Ascetics and other persons, who by habit or religious vow have relinquished all care of wordly affairs.

Ninth—Persons disabled by permanent diseases, which confine them to their homes.

Tenth—Persons specially exempt by any order of Government.

V. The Collector in each District shall make out, yearly, under the direction of the Commissioner, a list of the names and dwelling-places of all persons within his District, qualified and liable to serve on juries, whose usual dwelling is not more than—miles from the Sudder Station, where a Court of Sessions is held.

VI. Any person excluded from the list, who thinks that his rank, station and character entitle him to be included therein, and also every person improperly included therein, may require the Collector to alter the list accordingly ; if the Collector shall not comply with the request, an appeal from his decision shall lie to the Commissioner whose decision is final. The list, when finally corrected, shall be sent to the Magistrate at the Sudder Station.

VII. The Magistrate at the Sudder Station shall summon as many persons as seem to be needed for Jury trials. The names shall be drawn by lot excluding those who have served within two years, unless when the number cannot be made up without them.

VIII. All persons liable to serve on juries, who shall refuse or, without lawful excuse to be allowed by the Judge, neglect to attend when summoned, or who, when attending shall refuse to try the prisoners whom they are charged to try, shall be liable to such reasonable fine, as the Judge, having regard to their rank and means of paying the fine, shall set on them for their contempt of Court : all such fines shall be subject to review on summary appeal to the Nizamut or Fouzdaree Adawlut.

IX. Whenever any Jury trial is to be had, five persons shall be chosen by lot, at the time of holding the Sessions from those who attend on their summons ; in default of a sufficient number the Judge shall make up the Jury from the persons present in Court, or whom he shall cause to be summoned for the purpose.

X. Either the prosecutor or the prisoner may object to any of the persons chosen to be of the Jury, stating the ground of his objection ; if it is allowed by the Judge, juryman objected to shall be set aside for that trial and another chosen in his stead. The place of birth, descent or creed of any juryman shall not be lawful ground of challenge. If not objected, the same Jury may try as many prisoners successively as to the Judge seems expedient.

XI. One of the Jury shall be appointed by the Judge to act as Foreman.

XII. All the evidence for and against the prisoner shall be taken in the presence and hearing of the Jury who shall be entitled to suggest questions to the witnesses, which, if proper to be put, shall be put under the direction of the Judge. At the end of the trial the Judge shall explain the evidence to the Jury and thereon the Foreman shall declare the verdict of the Jury, whether, in their opinion, or in the opinion of majority of them, the prisoner is guilty or not guilty.

XIII. As soon as the verdict is given the Judge shall declare his approval a disapproval of it. If the Judge approves of a verdict of not guilty the prisoner shall be discharged ; if the Judge approves of a verdict of guilty he shall proceed to pass sentence on the prisoner, or send the proceeding for final sentence to the Nizamut or Foujdari Adawlut, as the case may be, according to law ; and the Jury shall have no voice in deciding on the amount of punishment to be awarded ; if the Judge disapproves of the verdict he shall refer the case with his observations to the Nizamut or the Fouzdaree Adawlut. In the last-mentioned case

the Jury shall also be empowered to record, under the hand of their foreman, the reasons for their verdict, which the Judge shall send with the other records of the trial.

XIV. An appeal shall lie to the Nizamut or Foujdaree Adawlut against the decision of the Judge in not setting aside a juryman objected to ; if on such appeal the objection is sustained the Court may order a new trial.

XV. The Governor-General of India in Council may from time to time suspend the operation of the previous Sections of this Act in those Districts in which there is not a sufficient number of inhabitants qualified to furnish a Jury.

XVI. After the passing of this Act no futwa shall be required, in any case, from the law-officers of any Court.

Ordered that the draft now read be published for general information.

ACT NO. OF 1849,

AN ACT FOR ABOLISHING EXEMPTION FROM THE JURISDICTION OF THE EAST INDIA COMPANY'S CRIMINAL COURTS.

Whereas Her Majesty's subjects residents in the territories under the Government of the East India Company without the towns of Calcutta and Madras and the town and island of Bombay are now by law exempt from the Jurisdiction of the Criminal Courts established by the East India Company in the said territories, to which all other persons, whether natives or other inhabitants in the said territories beyond the said towns and island, are amenable ; And whereas it is necessary for the due administration of Justice that such exemption be abolished, it is enacted as follows :—

I. In every part of the territories under the Government of the East India Company without the towns of Calcutta and Madras and the town and island of Bombay, all persons are amenable to the jurisdiction of the Magistrates and Criminal Courts of the East India Company, and may be apprehended, tried and punished by them respectively according to the Regulations and Acts now or hereafter to be in force, save only that no such Magistrate or Court shall have power under this Act to sentence to the punishment of death any of Her Majesty's natural subjects born in Europe or the children of such subjects.

II. Every one of Her Majesty's natural-born subjects born in Europe and every child of such subjects, convicted by any such criminal Court of any offence which, according to the Regulation or Act now or hereafter to be in force, is punishable with death, shall be transported out of the territories under the Government of the East India Company for life or for such term as the Court shall judge.

III. The Judges and Magistrates of the Courts of the East India Company may in any case in which it shall seem fit to them, with the approval of the Governor, Lieutenant-

Governor or Governor-in-Council of the Presidency or place, send any of Her Majesty's natural born subjects born in Europe, or the child of any such subject charged with any offence before them to be tried before the Supreme Court of Judicature, instead of trying and punishing him under this Act.

IV. Clause CV of 53 George III Chapter 155, being so much of an Act of Parliament passed in the 53rd year of the reign of King George III for the better administration of Justice within the British territories in India, as relates to assaults, forcible entries or other injuries accompanied by force, which may be committed by British subjects at a distance from the place where the Courts are established by Royal Charter, is repealed.

V. Nothing by this Act shall be deemed to take away the jurisdiction of the several Courts established by Royal Charter in Calcutta, Madras and Bombay for the trial and punishment of treasons, felonies and misdemeanours and for the due administration of criminal justice according to the tenor of the said several Charters, so, nevertheless, that no person shall be punished twice for the same offence.

VI. The word, Magistrate, as used in this Act, shall be understood to mean every officer, however styled, who has authority to exercise all or any of the powers of a Magistrate.

Ordered that the draft now read be published for general information.

The afore-quoted two Bills were, however, dropped, because strong agitation ensued ; the European community strenuously opposing their acceptance, claiming their right 'to be judged by their own peers.'

In tracing the history of judicial institutions, such as there were in the Presidency Towns and in the Mofussil, one cannot fail to notice the dissimilarity in their origin, the wide difference between their procedures and between the laws that they administered. This diversity could not but create an uncertainty as regards the rights and liabilities of people amenable to their respective jurisdictions and consequently produced a sense of insecurity which is always very much to be deplored. To remedy this state of things, an amalgamation of the two rival sets of judicial institutions and the introduction of a uniform system of law and procedure, as far as practicable, were absolutely necessary. The abolition of the East India Company, the assumption of direct responsibilities of Government by the English Crown and the consolidation of the Indian Empire under Her Majesty Queen Victoria in 1858 gave an opportunity for such measures being adopted. Cowell says⁴,—

"In the next three years after the Proclamation of the Queen, first the Civil Procedure Code and then the Penal Code, and almost immediately afterwards the Criminal Procedure Code, all of which had been long in preparation, were enacted. They applied to the whole empire, and all Courts were governed by the procedure therein laid down, except the Supreme Courts and those established by Royal Charter. When these Codes had been passed a

4. Ibid, pp. 225-226.

very long stride had been made in the direction of one uniform system for the administration of justice in India. The next step was to abolish the Supreme Courts in the three Presidencies and the anomalous procedure observed in them and constitute in each Presidency town a High Court of Judicature, which would be supreme over all the Courts both in the Presidency Town and also in the Mofussil. The plan had long been in contemplation ; in fact the continued existence of the Supreme Courts, alien as they were from the rest of the judicial system, was due to the high character they had maintained and the confidence which was reposed on them by the public, and to the divergence in law and procedure to which I have referred and to the long delays in maturing and passing the three Codes mentioned above."

In 1861 the first Code of Criminal Procedure was passed which meant to lay down uniform procedures for all the Courts in the British Empire except for the Supreme Courts and those established by Royal Charter. About the year 1852 an Act was proposed in the Governor-General's Council to give to every man the right of being tried by the judgment of his peers ; but the Act was considered "premature for the comparatively ignored and uncivilized people of this country." It has been already shown that before the system of trial by Jury was introduced, its place was occupied by the system of trial by Panchayet.⁵ All the Local Governments thought highly of that system and considered it best suited to the 'primitive' inhabitants of this country. But there were some officials who thought otherwise, and the view that they took of it is best expressed by Sir George Campbell who shared it and put it in his book entitled *Modern India* in these words :—"In fact the Judge generally puts into the box some of the pleaders and other people about the Court in order to comply with the law, and intimates to them very broadly his own opinion ; they always agree and there is no more trouble". In 1859, the Criminal Procedure Bill was introduced. It included the system of trial by Jury. The Bill was passed in the same year but did not come into force immediately, because there was one point on which there was a contest left undecided, namely whether the Local Governments or the Legislature were to decide as regards the places where and the cases in which the system was to be adopted and enforced. This point was eventually settled in favour of the Local Governments, and thereafter the Bill was reconsidered and re-passed as Act XXV of 1861. The Code of 1861 introduced the system of trial by Jury. Of this Code Sir (then Mr.) James Fitz-James Stephen said that it was drawn by men thoroughly well-acquainted with the system with which they were concerned ;

5. 'Panchayet' or the Indian Jury of five ('Panch Parameshwar' is a common expression implying that five persons acting together cannot err in their decision just as the Almighty cannot err. So also is the Marathi saying 'Panchmukhi Parameswar,' which means the voice of five persons is the voice of God), is to be found in all castes or creeds. It consists of five persons, nominated by the disputing parties, each party nominating two, and the four so nominated appointing a fifth who may be called the foreman. Their business was not to weigh the

evidence but to find out the truth. The evidence was heard in private and not necessarily in a Court of law. The institution served a good purpose and barring the evils of stray corruption it was very useful in amicably settling disputes without exposing the parties to the expenses of a law Court. Sir George Campbell in his book entitled *Modern India* speaks of the Panchayet system as "one of the most marked in the customs of the country and having the strongest of sanctions,—that of public opinion".

but I am inclined to doubt whether they did not know it rather too well, for they certainly threw the various provisions together with very little regard to arrangement and without any general plan". This Code provided that Indian juries were to be of the nature of an examining body selected from the loyal subjects of Her Majesty and guided in their office, as to the technicalities of the law, by the presiding Judge; they were to try only specified offences; every year a list of jurors was to be published, prepared by the Collector with the assistance of the Sessions Judge; and each panel for the trial of a case was to be formed of persons chosen by lot from those summoned to act as such and each juror before taking part in the trial was to take oath.

Later legislation as to Criminal Procedure, in so far as it operated, from time to time, to introduce changes into the system of Trial by Jury, will be noted separately in appropriate places in Part II in this book.

On the introduction of the Code of 1861 the Government of Bengal fixed seven as the number of Jurors for all trials and also in the course of 1862 directed that trials should be held by Jury in the Sessions Courts of the Districts of 24 Parganas, Hooghly, Burdwan, Murshidabad, Nadia, Patna and Dacca in respect of offences under the following Chapters of the Indian Penal Code :—Chap. VIII (Offences against the public tranquility); Chap. XI (False evidence and offences against public Justice); Chap. XVI (Offences affecting the human body); Chap. XVII (Offences against property); Chap. XVIII (Offences relating to documents and to trade or property-marks); and also abetments of or attempts to commit any of these offences. In 1873 the number of Jurors for a trial was reduced with the concurrence of the High Court from seven to five. In 1917 the Government of Bengal had reports that trial by Jury in Bengal had neither been a conspicuous failure nor a conspicuous success, and so expressed the opinion that excluding the non-regulation Districts, Darjeeling, Jalpaiguri and the Chittagong Hill Tracts, there was no very strong reason why it should not be extended to twelve more Districts namely, Bakarganj, Bankura, Birbhum, Bogra, Dinajpore, Faridpur, Maldah, Midnapore, Noakhali, Pabna, Rangpur and Tipperah. They also gave as their opinion that Chap. XII of the Indian Penal Code (Offences relating to counterfeit coins and Government stamps) might be suitably added to the list of offences so triable. Eventually in 1918 a Notification of extension was published, and thereafter on the 1st January 1919 a revised Notification was issued extending the system of trial by Jury to all the Districts of Bengal with the exception of Darjeeling, Jalpaiguri and the Chittagong Hill Tracts, the offences triable being those under Chap. VIII, XI, XII, XVI, XVII, XVIII and XX of the Indian Penal Code, S. 52 of the Indian Post Office Act (VI of 1898) and abetments of and attempts to commit any of those offences.

In 1919 the system was extended to Sylhet, it having been in force in Assam Proper and the six other Districts of the Assam Valley Districts since 1862.

The Bombay Government did not avail themselves of the Jury system given by the Code, of 1861 up to 1866, till which time the mode of trial was with the aid of assessors according to Reg. XIII of 1827. On the 1st January 1867 it was introduced into the

District of Poona only and the Government fixed the number of Jurors in a trial at five and the offences so triable being those for which the punishment was death, transportation for life or upwards of ten years, or imprisonment for over ten years. Seeing the satisfactory working of the system in Poona the Government of Bombay extended the system to five more Districts, namely Ahmedabad and Karachi in 1884, Surat and Belgaum in 1885 and Thana in 1886. Thus it began to obtain in six out of the twenty-three Districts which constitute that Presidency.

In the Madras Presidency, Act XVII of 1862 repealed the Jury Act and introduced the system of trial by Jury as provided for in the Code of 1861. It was first introduced with the number as seven and to the Districts of Tanjore, Cuddalore, Arcot, Chittor, Chuddapa, Rajahmundry, Vizagapatam, Tranquebar and a few others. In 1873 the number constituting a Jury was reduced to five. In 1876 certain exemptions were made as regards serving on the Jury, especially as regards attorneys, vakils and advocates. In 1883 the system was extended to all the Districts of the Presidency except as regards certain classes of cases in the Agency Tracts of Ganjam, Godavery and Vizagapatam.

Jury trial was introduced tentatively for two years in 1884 at Lucknow, Allahabad and Benares and has continued there since then.

In Burma, the Jury system was introduced in the Court of the Recorder of Rangoon, of the Judge of Moulmein and also in Akyab. In 1886 when the Criminal Procedure Code was made fully applicable to the whole of Upper Burma except the Shan States, Reg. VI of 1886 was passed extending the system to that area but this extension was withdrawn in 1889.

In the Punjab, trial by Jury, number being seven, obtained in Lahore, Rawalpindi, Peshwar, Simla and Delhi; while in Umbala, Mooltan, Jullundhur, Amritsar, Ferozepore and Sialkot, the number is five.

In the Central Provinces, Nagpore, Jubbulpore, Saugar, Raipur and Hosangabad are Jury Districts.

As has been already stated elsewhere as regards England, so in this country too opinion has always been and even at the present day is divided as regards the success of the system. Space will not permit us to go into detail over this matter, but to one who cares to examine the position it is apparent that there has been no consistency at all, while on the other hand there is overwhelming conflict in the views which different individuals or different public bodies and also different members of one and the same body have expressed on it from time to time.

One thing, however, is certain, as a very eminent criminal lawyer, Mr. Lal Mohon Ghose, put it in one of his speeches: "Wherever the institution prevails it is cherished by the people for it is not an engine for securing a conviction but is a valuable safeguard of the liberty of the subject and a protector against false charges and unjust convictions." And a Judge of very great experience Mr. (afterwards Mr. Justice) Benson, then the Sessions Judge of Arcot, gave as his deliberate opinion in 1890,—“Juries are more often right on the facts than Judges in their self-sufficiency give them credit for”. Whether Judges in the

exercise of the powers which they have to interfere with the verdict of the Jury do real justice in all cases or whether the verdicts so interfered with do not in the majority of cases do substantial justice is a matter on which opinion is not always in favour of the Judges who so interfere. But the cry has never ceased to be raised that Jury system in this country has not worked satisfactorily. The result of this in the nineties of the last Century was an agitation which assumed somewhat gigantic proportions and to which some reference is necessary.

In Bengal, when the Jury system was introduced in 1862, Sir Cecil Beadon was the Lieutenant-Governor of the Province. It has been already stated that the system was first introduced into only seven of the Districts of the Province. Buckland writes ⁶:—

"In 1863-64 the reports of the Magistrates and Commissioners on the working of the system were all more or less unfavourable. In the next year it was reported to have on the whole worked well. Greater care was ordered in preparing the Jury lists. It was subsequently proposed that the system should be extended to other Districts, and that it should be made applicable to the trial of offences other than those to which it had been at first restricted. In connection with these suggestions, it was also proposed that Judges should be empowered to empanel special Juries for the trial of cases of peculiar difficulty, and that arrangements should be made for preventing access being had to Jurors during the continuance of a trial. While these questions were still under consideration, Sir Cecil Beadon, before retiring from office, considered it right to place on record his conviction that the trial of offences of all classes before the Court of Sessions in all parts of the Lower Provinces ought to be by Jury, and that the system could be generally adopted without prejudice to the administration of criminal justice, and would be attended with decided benefit to the Courts and increased confidence of the public in their judgments. The High Court, on the contrary, maintained in their Annual Report on Criminal Justice for 1866 that the working of the system in the seven regulation Districts in which it had been already introduced had not been so successful as to warrant its extension to other places at present",

He then writes⁷ :—

"Special enquiries were made in 1883 as to the feasibility of extending the Jury system in Districts other than the seven in which it then obtained. Judged by the comments of the vernacular Press the subject had a special interest for Natives. Everywhere the suggestion was opposed by local Judges, on the ground chiefly that there was not a sufficient number of educated natives in the District to form a qualified Jury list. The High Court Judges were also opposed to the measure".

In 1890 the Government of India ordered a general enquiry into the working of the Jury system. So far as Bengal was concerned, what took place then has been narrated by Mr. Buckland thus⁸ :—

"In May 1890 the Government of India called for a report from the Bengal Government

6. C. E. Buckland's *Bengal under the Lieutenant Governors*, 2nd. Edn. Vol. 1, Pp. 322-323.

7. Ibid. Vol. II, P. 797.

8. Ibid, Vol II-P. 945 *et. seq.*

on the working of the Jury system in Bengal, with special reference to the opinion entertained as to its merits and as a means of repression of crime, and requested that any improvements in its application which appeared to be necessary might be brought to notice. The subject arose out of an enquiry which had been occupying the Government of India regarding the working of the Police and the machinery for the repression of crime in British India. during which it had been alleged by several authorities consulted that the Jury system had, in some degree, favoured the escape of criminals. Reports were accordingly called for from the Commissioners and Judges of those Districts in which the system was in force, as well as from the Inspector-General of Police. Sir Charles Elliot (then Lieutenant-Governor of Bengal) was also favoured with a copy of the replies of the Hon'ble Judges of the High Court to a separate communication which had been addressed to them by the Government of India. From the Reports and Minutes received it became evident that the majority of the most experienced Judges and officers consulted emphatically condemned the system as then worked in Bengal, and were all of opinion that it was capable of improvement. After a careful consideration of the opinions and statistics before him, Sir Charles Elliot reported to the Government of India that there could be no doubt of the failure of the Jury system in those Provinces in its existing shape. It was pointed out that it would be scarcely possible to obtain opinions from a large number of men more nearly approaching to unanimity than was the condemnation of the Jury system in Bengal contained in the Reports and Minutes collected. Sir Charles Elliot expressed his opinion that if the result could have been foreseen, no advocate could have been found for the introduction of the western institution into India, but as it had been introduced and was prized on political grounds as a means of identifying the people of the country with the administration of Justice, he was averse to its total abolition, and thought that it would be sufficient to make some changes in its working as seemed best calculated to remove the objections which had been raised. To this end it was suggested that some extension should be made in the right of appeal ; that Section 307 of the Criminal Procedure Code should be amended so as to make it incumbent on the Sessions Judge to refer to the High Court every case in which he differed in opinion from the Jury ; that Section 303 of the Criminal Procedure Code should be altered so as to make it incumbent upon the Judge to ascertain and record fully the reasons of the Jury for their verdict ; that certain classes of cases, especially those relating to murder, offences against the human body (with certain exceptions), offences against public tranquility, and offences relating to documents and trade-marks, should be withdrawn from the cognizance of Juries ; that the remaining classes of offences to which the Jury system applied should be continued to be so tried; and that offences relating to marriage should also be made triable by Jury ; it was also recommended that where qualified Jurymen were not easily available, the number of the Jury should be reduced from five to three and that the limit of age qualifying for serving on a Jury should be raised to twenty-five.

“In reply to these proposals the Government of India remarked that from a review of the Reports received from other Provinces as well as from Bengal it appeared that the defects of the existing system of trial by Jury were mainly attributable to two causes :— (1) to the extension of the Jury system (a) to areas to which it was unsuitable, and (b) to classes of offences, which, as experience showed, ought not to be cognizable by Juries ;

(2) to the fact that the provisions of Section 307 of the Criminal Procedure Code, which were intended to give Sessions Judges and the High Court power to remedy and correct wrong verdicts, had failed to fulfil its intention.

"His Excellency in Council expressed his approval of the suggestions made by Sir Charles Elliot for modifying the classes of offences which should be made triable by Jury. With regard to the proposals to amend Sections 303 and 307 of the Criminal Procedure Code the Governor-General in Council observed that although there was a strong body of opinion among the Hon'ble Judges of the Calcutta and Madras High Courts in favour of the proposal to amend Section 307, yet it did not seem desirable that the Judge should be bound to refer cases in which the failure of justice was not quite clear; while, with regard to the proposal to modify Section 303, it was remarked that no room should be allowed for anything approaching to a cross-examination of the Jury, not only because it would be difficult for untrained men, such as the Jurors would be in most cases, to formulate their reasons in a satisfactory shape, but also because it was doubtful whether a mere statement of their reasons would help materially towards the disposal of the case. With reference to the question of allowing an appeal on the facts from the verdict of a Jury, His Excellency was of opinion that this was not expedient, as it was not clear what advantage there would be in retaining the Jury system at all if it was to be reduced so nearly to the level of a trial with assessors, and the necessity of any such change in the law would be obviated by removing from the cognizance of Juries such classes of cases as experience showed to be unsuitable."

"A Notification was then published on the 20th October 1892 embodying the alteration which has met with the approval of the Government of India, in respect to the classes of cases to be tried by Juries. At the same time the full correspondence on the subject was published in the Gazette. The publication of these orders was, however, received by an influential section of the public with much dissatisfaction, and disapproval was expressed at the partial removal of what was looked upon as an important privilege".

By the Notification afore-mentioned nearly a half of the cases previously triable by the Jury were withdrawn from their cognizance. An agitation was set on foot the like of which has hardly, if ever, been seen. The Notification roused the indignation of the country from one end to the other. A public meeting was held in the Town Hall of the City of Calcutta on the 20th November 1892, which was fully representative of public opinion of the day, and the Notification was condemned in most scathing terms. A series of articles appeared in the Indian Daily News, over the nom-de-plume of Sadik Dost, condemning the Notification as 'outrageous', with criticisms of a very high order. All these led the Parliament to instruct the Government of India to appoint a Special Commission.

A Special Commission was accordingly appointed by the Earl of Kimberley, the then Secretary of State for India, in 1893, with the Hon'ble Mr. Justice (afterwards Sir Henry) Prinsep as the President, and the following as members, - Maharaja Sir Jotindra Mohan Tagore and Sir Romesh Chunder Mitter, as representing the Indian Community; Sir Griffiths Evans, as representing the Bar; and Mr. C. A. Wilkins I. C. S., a Sessions Judge. Mr. H. C. Streatford

J. C. S. an Under-Secretary to the Government of Bengal was appointed Secretary to the Commission.

Mr. Buckland then says ⁹—

“The Commission came to the conclusion that it was desirable that the classes of offences which before the 20th October 1892 were triable by Jury in the seven Districts of Bengal to which the system had been originally extended, should continue to be triable by Jury in those Districts and that the revised classification should be amended. In compliance with the recommendation of the Commission, and with the previous authorization of the Governor-General in Council the Notification of the 20th October 1892 was then withdrawn.¹⁰ The further recommendations made by the Commission were taken into consideration. While the more general questions were under discussion, a careful revision of the Jury lists were undertaken under Sir Charles Elliott's orders, in all the Districts concerned, with the result that the number of persons liable to serve on a Jury was reduced, while the qualifications of those selected were raised to a more efficient standard.”

As a revision of the Code of Criminal Procedure was impending at the time and it was not known to what extent the system of trial by Jury would be affected thereby, public opinion, which rightly or wrongly has always set a high value on the system, demonstrated itself in the shape of resolutions passed at the Sessions of the Indian National Congress,—one held at Poona in 1895, and the other at Calcutta in 1896.

The resolution that was passed by the Poona Congress of 1895 was in these terms :—

“That this Congress views with alarm the constant changes that are being made and threatened on the subject of Trial by Jury, and, regard being had to the fact that no demand for any such change had been made from any portion of the population of British India, trusts that the Bill now before the Supreme Legislative Council will not be further proceeded with ; and this Congress, reaffirming the resolutions passed by former Congresses, also trusts that Trials by Jury will be extended to the Districts and offences to which the system at present does not apply and that their verdict should be final”.

In the Calcutta Congress of 1896 the following three resolutions were passed :—

1. That in the opinion of the Congress time has now arrived when the system of Trial by Jury may be safely extended to many parts of the country where it is not at present in force,
2. That in the opinion of the Congress the innovation made in 1872 in the system of Trial by Jury, depriving the verdicts of Juries of all finality has proved injurious to the country and that the powers then for the first time vested in Sessions Judges and High Courts of setting aside verdicts of acquittals should be at once withdrawn.
3. That in the opinion of the Congress a provision similar to that contained in the

9. Ibid, Vol. II, P. 948.

10. By a Resolution of the Government of Bengal, dated 29th March, 1893.

Summary Jurisdiction Act of England (under which accused persons in serious cases have the option of demanding a committal to the Sessions Court) should be introduced into the Indian Code of Criminal Procedure, enabling accused persons, in warrant cases, to demand that instead of being tried by the Magistrate they be committed to the Court of Sessions.

The trend of the discussion was in favour of the view that by the progress of education throughout the country, Provinces which at one time were backward had come forward and were ready to accept and were desirous of obtaining 'the boon' of Trial by Jury ; but that it would, of course, remain for the Executive Government to exclude certain Districts from such trials as being yet unfit for such trials. The Code of 1898 was thereafter passed and the agitation abated.

PART II—Of Trials before High Courts and Courts of Session.

Chapter XXIII of the Code of Criminal Procedure.

CHAPTER I.

A—Preliminary—ss. 266-270 Cr. P. C.

S. 266. In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression "High Court" means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Courts of the Judicial Commissioners of the Central Provinces, Oudh and Sind and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter and of Chapter XVIII.

S. 267. All trials under this Chapter before a High Court shall be by jury ;
and, notwithstanding anything herein contained, in all criminal cases transferred to a High Court under this Code or under the Letters Patent of any High Court established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, the trial may, if the High Court so directs, be by jury.

S. 268. All trials before a Court of Session shall be either by jury, or with the aid of assessors.

S. 269. (1) The Local Government may, by order in the official Gazette, direct that the trial of all offences, or of any particular class of offences, before any Court of Session, shall be by jury in any district, and may, with the like sanction, revoke or alter such order.

(2) The Local Government, by like order, may also declare that, in the case of any district in which the trial of any offence is to be by jury, the trial of such offences shall, if the Judge, on the application made to him or of his own motion so directs, be by jurors summoned from a special jury list, and may revoke or alter such order.

(3) When the accused is charged at the same trial with several offences of which some are and some are not triable by jury, he shall be tried by jury for such of those offences as are triable by jury, and by the Court of Session, with the aid of the jurors as assessors, for such of them as are not triable by jury.

S. 270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

List of Headings :—

1. Trial by Jury
2. The Courts before which trials by Jury shall be held.
3. What cases before the High Court are triable by Jury.
4. What trials before the High Court may or may not be by Jury.
5. What trials before a Court of Session shall be by Jury.
6. Trial at one trial of offences some of which are triable by Jury and some by assessors.
7. Validity of trials wrongly held by jurors or assessors.
8. What trials before a Court of Session shall be with the aid of assessors.
9. Public Prosecutor,—his appointment, powers and duties.

COMMENTARY—

1. Trial By Jury—

The word 'trial' has not been defined in the Code. It means the examination of a cause, Civil or Criminal, before a Judge who has jurisdiction over it, according to the laws of the land; 'trial' is to find out by due examination the truth of the point in issue or question between the parties, whereupon judgment may be given¹; and in criminal cases, it begins when the accused is charged and called on to answer and when the question before the Court is whether the accused is to be convicted or acquitted, and not whether the complaint is to be dismissed or the accused discharged.² It is an essential principle of English Criminal Law that the trial of an indictable offence has to be conducted in the presence of the accused, and for this purpose 'trial' means the whole of the proceedings including sentence. In cases of misdemeanour there may be special circumstances which permit a trial in the absence of the accused, but in trials for felony the rule is inviolable, unless possibly the violent conduct of the accused himself intended to make trial impossible and renders it lawful to continue in his absence.³ Trial by Jury means trial before a Court consisting of a Judge and a body of laymen chosen from the people of the locality or adjacent places, wherein the Court is situate, which body is termed a Jury, and whose function is to pronounce its opinion or verdict as to the guilt or innocence of the accused. The whole essence of a trial by Jury is that, if an accused has a right to a Jury, he is entitled as of right to call upon the prosecution to obtain a verdict against him on the facts laid before the Jury before he can be convicted at all.⁴ It is a substantive right and not a mere matter of procedure.⁵ The Judge is bound to accept the verdict and pronounce his orders accordingly, except in certain specified cases to be noted hereafter. The Jury thus constitutes a part and a very important part of the Court.⁶ In a Jury trial the word 'Court' must mean "The Judge and Jury".⁷ As to the respective duties of the Judge and the Jury, see Ch. VII *post*.

The Jury system of trial introduced in India is no doubt based upon the English system, but there are essential differences between the two. No doubt, the Jury is a body similar in some respects to that in England, and discharges similar functions⁸; but the theory of trial by Jury in this country outside the Presidency towns is one wholly distinct from that in

1. Wharton's Law Lexicon. In Oxford Dictionary the meanings of the word given under the heading 'Law' are: '1. The examination and determination of a cause by a judicial tribunal; the determination of the guilt or innocence of an accused person by a Court; 2. The determination of a person's guilt or innocence or the righteousness of his cause between the accuser and the accused' etc. See *Per Mukerji, J.* in Harihar Sinha (1936) 40 C. W. N. 876 (F. B.) at p. 889.
2. Narayanaswamy (1908) 32 M. 220, 234. (F. B.); 19 M. L. J. 157; 9 Cr. L. J. 192; 1 I. C. 228. See also Gomer (1898) 25 C. 863;

- * Chotu (1886) 9 A. 52 (F. B.); Tukaram (1904) 6 Bom. L. R. 91; Palaniandy Gounder (1908) 32 M. 218; 9 Cr. L. J. 146; 1 I. C. 54.
3. Lawrence (1933) A. L. J. 1025; 34 Cr. L. J. 886; A. I. R 1933 P. C. 218; 145 I. C. 209.
4. Ikramuddin (1917) 39 A. 348; 15 A. L. J. 205; 18 Cr. L. J. 491; 39 I. C. 331.
5. Fitzmaurice (1925) 6 L. 262; 27 Cr. L. J. 421; A. I. R. 1925 L. 446; 93 I. C. 149.
6. Bhairab (1898) 25 C. 727; Tirumal (1901) 24 M. 523.
7. Ashootosh (1878) 4 C. 483 (F. B.).
8. Etwari Sahu (1887) 15 C. 269.

England ; there it rests upon the great constitutional principle that every person is entitled to demand that he be not restrained of his liberty, except *per legale judicium parium suorum vel per legem terræ*, so the trial by Jury is the rule, except in the particular cases where Parliament has, by Statute, allowed summary conviction ; that great principle underlies the finality of verdicts given by English juries, while trial by Jury in this country is altogether devoid of that constitutional character ; no man here has an inalienable right to be tried by Jury, it is simply a mode of trial which the Government by an order in the Gazettee can at any time extend to a particular district for particular classes of cases, and the Government may at any time afterwards revoke such order.⁹ As has been observed,—¹⁰

"The trial by Jury spoken of in S. 322 of the Code of Criminal Procedure (of 1861) is, we have no doubt whatever, the mode of trial described in the 23rd and 25th chapters of that Code and nothing else. It was observed that the word 'juror' was not defined in the Code and from this the inference was said to follow that you must resort to the English notion of juror as being familiar and well ascertained. But neither is the term 'assessor' defined, and it will hardly be contended that we shall derive any information as to the meaning of this term from the English Criminal Law. The fact is, as most people conversant with the criminal law of Bengal are aware, that both notions—that of juror and that of assessor—are taken, greatly modified and expanded no doubt, from the Bengal Regulation VI of 1832, which made, so to say, the first breach in the system of "trial and punishment under the provisions of the Mahomedan Criminal Code". A reference to Clause 4 of Section 3 of that Regulation will show with what sort of functions the legislature of that day clothed persons who were called jurors. Under the Code, no doubt, in the place and in respect of the class of offences and for such period of time as the Executive Government directs, the Jury of British India decides upon the facts in criminal trials. But Jurors, who are not *jurati* at all, who may determine by a prescribed majority, and whose functions may cease at any time on the publication of any order in the Gazette, are clearly not the Jurors, nor is the system of trial in such circumstances the system, of England".

Trial by Jury is a recent institution in India and if in the Muffasil the Judge disagrees with the finding of fact by the Jury, he can refer the whole case to the High Court ; but in England, if an improper verdict of 'not guilty' is found in felonies and misdemeanours, the Courts do not set it aside, holding it to be better that the guilty should escape than that the matter should be tried over again, and even in penal actions it has been held that a wrong verdict is not a ground for a new trial.¹¹ The verdict of a Jury in India has not the same finality as in England, because the Jury system here was introduced as an experiment, and

9. *Per Jackson J.* in *Gorachand* (1868) 11 W. R. 29 (F. B.), See also *Barindra* (1907) 37 C. 467, 517; 14 C. W. N. 1114; 11 Cr. L. J. 453; 7 I. C. 359.; *Mukhun* (1877) 1 C. L. R. 275; *Smither* (1902) 26 M. I. 16.; *Ramesh* (1913) 41 C. 350, 374; 18 C. W. N. 498; 15

Cr. L. J. 385; 23 I. C. 985; *Manindra* (1914) 41 C. 754; 18 C. W. N. 580; 15 Cr. L. J. 402; 23 I. C. 1002.

10. *Hurry Prosad* (1870) 14 W. R. 59. See also *Lakshuman* (1867) 3 B. H. C. R. 56.

11. *Khandarav* (1875) 1 B. 10.

therefore it was necessary that provisions should be made against a miscarriage of justice.¹³ A verdict of acquittal by an English Jury is (subject to the peculiar provisions of S. 3 of the English Criminal Appeal Act, 7 Ed. VII, C. 23) absolutely inviolate, and a verdict of conviction, provided that there has been no misdirection, is almost equally so; whereas the Indian Code of Criminal Procedure provides several instances in which the verdict of the Jury on issues of fact may be reviewed; the English Jury is a product of the Common Law; and the Indian Jury is a statutory creation upon whose powers very definite and statutory limitations are imposed and the verdict of an Indian Jury has no higher status than that conferred upon it by the statute to which it owes its own creation.¹³ Trial by Jury in the Muffasil is the creation of statute;¹⁴ but the same thing cannot be said in respect of the Presidency Towns, for the High Courts there, as successors of the Supreme Courts, have inherited some of the principles of the English system;¹⁵ for all persons brought up for trial before a High Court must be tried by a Jury (S. 269) and the unanimous verdict of the Jury is binding on the Judge whether he agrees with it or not (S. 305), though the statute has modified that system in various other matters, as it will be seen later on. The jurors here can give their verdict by a majority or by a prescribed majority, but the unanimous verdict of a Jury of twelve in England is, in respect of weight, a different thing from the decision by a majority, or even from the unanimous decision of a body of five, or seven, or nine.¹⁶ So, technicalities based on the sacred character of verdicts in England are not to be imported into the Code¹⁷, and the English law has no application when the procedure in a Jury trial is consistent with the Code.¹⁸

2. The Courts before which trials by Jury shall be held.

1. HIGH COURT—Which means and includes (a) the High Courts of Judicature at Fort William, Madras, Bombay and Allahabad, which were established under the Indian High Courts Act, 1861; (b) the High Courts of Judicature at Patna, Lahore and Rangoon, which were established under the Government of India Act, 1915; (c) the Chief Courts of Oudh and Sind; (d) the Court of the Judicial Commissioner of the Central Provinces; and (e) such other Courts as the Governor-General in Council may declare to be High Courts for the purposes of holding trials by Jury under Ch. XXIII of the Cr. P. Code (See S. 266). The expression "High Court" has, therefore, been used in S. 266 in a limited sense, for the definition of "High Court" as given in S. 4 (i) would include not only the Courts mentioned in clauses (a) to (d) above but also the highest Court of Criminal appeal or revision for any

12. Dada Ana (1889) 15 B. 452, 486. See also Gorachand (1868) 11 W. R. 29 (F. B.). Jurors were sworn after the passing of Act X of 1873.

13. Rafi Miah (1932) 11 P. 669; 33 Cr. L. J. 877; A. I. R. 1932 P 246; 139 I. C. 835.

14. Rama Chandra (1895) 19 B. 749, 762.

15. See Pt. I, Ch V, *ante*.

16. Itwari Sahu (1887) 15 C. 269.

17. Ramesh (1913) 41 C 350, 374; 18 C. W. N.

498; 15 Cr. L. J. 385; 23 I. C. 985; Manindra (1914) 41 C. 754; 18 C. W. N. 580; 15 Cr. L. J. 402; 23 I. C. 1002; Umadasi (1924) 52 C 112; 28 C. W. N. 1046; 40 C. L. J. 143; 26 Cr. L. J. 11; A I R 1924 C. 1031; 83 I. C. 491; Singleton (1924) 29 C. W. N. 260, 267; 41 C. L. J. 87; 26 Cr. L. J. 662; A. I. R 1925 C. 531; 86 I. C. 38.

18. Hurry Prosad (1870) 14 W. R. 59.

other local area ; or where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf. It follows, therefore, that these latter Courts, though High Courts for other purposes of the Code as well as for the purposes of framing rules for the choosing of jurors (S. 276) and hearing references from a Sessions Judge who may have disagreed with the verdict of the Jury (S. 307), are not High Courts before which all criminals trials must be held by Jury in accordance with the provisions of Ch. XXIII, or to which commitments for trial can be made under the provisions of Ch. XVIII of the Code, unless they are declared to be High Courts, for the purposes of those Chapters also, by the Governor-General in Council.

Again, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, "High Court" means only the Courts mentioned in clauses (a) to (d) above (See S. 4 (j)). Thus, for instance, an European British subject being tried for committing an offence in the North-western Frontier Province, would have the privilege to have a reference under S. 307 heard, not by the highest Court of Criminal appeal or revision in that province but by one of the High Courts just mentioned, possibly the High Court at Lahore. Thus European British subjects, living in backward areas, have the privilege of being under one or other of the Chartered High Courts or the Chief Courts mentioned in clauses (a) to (d) above. For the purpose of trial in Rangoon of any person under the special provisions contained in Ch. XXXIII of the Code, which relate to cases in which European and Indian British subjects are concerned, reference to the Sessions Judge shall be construed as reference to the Rangoon High Court (S. 448). A Judge of the Court of the Judicial Commissioner of Sind has the powers of a Sessions Judge in the Sessions Division of Karachi by virtue of Bombay Act X11 of 1866 as subsequently amended ; but for the purpose of an original trial as a Court of Session which he holds, his Court is a High Court within the meaning of S. 266 ; and, therefore, if he disagrees with the verdict of a Jury, he disagrees as a Judge of the High Court and so the provisions of S. 305 applies, that it to say he cannot refer the case under S. 307.¹⁹ If he agrees with the verdict of the Jury and judgment follows, then an appeal may lie from it as from the judgment of a Sessions Judge, notwithstanding the amendment of S. 266.²⁰

The Indian High Courts Act, 1861, is 24 and 25 Vic. Ch. 104, and the Government of India Act, 1915, is 5 and 6 Geo. V. Ch. 61

(2) COURT OF SESSION—Which means a Court established by the Local Government for every Sessions division of a Province (S. 9). Under S. 7 of the Code every Province (excluding the Presidency Towns) shall be a Sessions division or shall consist of Sessions divisions. The Local Government shall appoint a Judge for each such Court. It may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts. It may also appoint the Sessions Judge of one

19. *Jiand* (1928) 29 Cr. L. J. 945 (F. B.) : A. I. R. 1928 S. 149 : 22 S. L. R. 349 : 111 I. C. 685 ;
Mithoo (1923) 25 Cr. L. J. 428 : A. I. R. 1925 S. 34 : 87 I. C. 604.

20. *Khudabux* (1924) 26 Cr. L. J. 562 (F. B.) : A. I. R. 1925 S. 249 : 85 I. C. 706.

division to be also an Additional Sessions Judge of another division. Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government may by general or special order direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial (S. 193 cl. (2))

The relation between a Sessions division and a district is this :—Every Sessions division shall consist of a district or districts and the Local Government may alter the limits or the number of such divisions and districts. (S. 7 Sub-Secs. (1) and (2)). Under the Criminal Procedure Code, therefore, there cannot be more than one Sessions division in a district, though there may be two or more districts in one Sessions division. Where there were two such Sessions divisions in one district, their jurisdictions were saved by Sub-Sec. (3) of S. 7, which provides that the Sessions divisions and districts existing when the Code comes into force shall be the Sessions division and districts respectively, unless and until they are altered by the Local Government.

3. What cases before the High Court are triable by Jury.

S. 267 of the Code enacts that all trials under Chapter XXIII of the Code before a High Court shall be by Jury. That Chapter is the last of the Chapters dealing with original trials. There are three other Chapters, XX, XXI and XXII, dealing with original criminal trials, where the Magistrates are the sole tribunals and they are solely responsible as judges of fact as well as of law. But in Chapter XXIII, the tribunal consists in some cases of a Judge and Jury, and in other cases of a Judge only but he must try the case with the aid of assessors. In Jury trials the Judge is solely responsible for the law and the Jury for the facts, while in trials with the aid of assessors the Judge, like the Magistrates, remains responsible for both law and facts and is not bound to conform to the opinions of the assessors, though he is required to record them.

Original criminal trials mean trials of cases arising within the local limits of the ordinary original jurisdiction of the Court trying them (S. 177). Some of these cases may be triable not in the Courts of Magistrates but in the Courts of Session, or in the High Court, if it has any local ordinary original criminal jurisdiction : Schedule II to the Code mentions the offences which are triable by the Courts of Session. If any case arises within the local limits of the ordinary original criminal jurisdiction of a High Court which is triable by Court of Session, then the High Court is the Court of Session for that place, and the case is triable by the High Court. The local limits of the ordinary original criminal jurisdiction of a High Court have not been defined in the Code of Criminal Procedure. Such limits, where it has any, are defined in its Charter. Every Presidency town shall, for the purposes of the Code, be deemed to be a district (S. 7 (4)) and therefore the High Court in such town is the Sessions Court there.

The High Courts at Calcutta, Madras and Bombay were established under the High Courts Act or the Charter Act, 1861 (24 and 25 Vic. Cl. 104, passed on the 6th August 1861). Clause 22 of the Letters Patent of these High Courts says,—“And we do ordain that the said High Court • • • shall have ordinary original criminal jurisdiction within the local

limits of its ordinary original civil jurisdiction"; and Clause 11 defines the local limits of its ordinary original civil jurisdiction to be "such limits as may, from time to time, be declared and prescribed by any law made by competent legislative authority for India." Thus the above High Courts have ordinary original criminal jurisdiction within the limits of the Presidency towns of Calcutta, Madras and Bombay respectively, and they may constitute their Courts of original criminal jurisdiction by one or more Judges of the said Courts (See Clause 25).

The only other High Courts which has similar local limits of its ordinary original criminal jurisdiction is the High Court at Rangoon (See Clause 21 of the Letters Patent for the High Court of Rangoon, dated November 11th, 1922). The High Courts at Allahabad, Patna and Lahore have no such local jurisdiction.

The Code of Criminal Procedure now regulates the proceedings in all Criminal Courts in British India relating to any offence under the Indian Penal Code. Offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigation, inquiry into, trying or otherwise dealing with such offences (See SS. 5 and 183, Cr. P. C. and S. 4, I, P. C.). Thus, trials under Act XIV of 1908 (now repealed) were without a Jury.

All original criminal cases relating to an offence (subject to S. 5 (2) of the Code) and triable in a Court of Sessions, arising within the local limits of the ordinary original criminal jurisdiction of a High Court are therefore triable by that High Court under Chapter XXIII of the Code and must be tried by a Jury.

S. 194 of the Code enacts that the High Court may take cognizance of any offence upon a commitment made to it in the manner provided therein. A commitment to the High Court would be made by a Presidency Magistrate of the town of Calcutta, Madras or Bombay (S. 213), and a Magistrate cannot commit a person for trial to the High Court when he can commit him for trial to a Court of Session (S. 206). In Rangoon, if a Magistrate is satisfied that a case ought to be tried under the provisions of Chapter XXXIII of the Cr. P. C. he may commit the case for trial to the High Court at Rangoon (SS. 446 and 448). A commitment can also be made by a Civil or Revenue Court to a High Court under the provisions of S. 478 Cr. P. C. The trials that follow upon such commitments to High Courts are trials under Ch. XXIII as noticed before and must be held by a Jury.

Besides the cases narrated above as coming for trial before the High Court by virtue of its local jurisdiction over them, original criminal cases may come up before it by virtue of its ordinary original jurisdiction and extraordinary original jurisdiction over *persons*. Thus, the Letters Patent of the Calcutta High Court provides :—

"Cl. 22. And we do further ordain that the said High Court of Judicature at Fort William in Bengal shall have ordinary original criminal jurisdiction (within the local limits of its ordinary original civil jurisdiction; and also) in respect of all such persons both within the limits of the Bengal Division of the Presidency of Fort William, and beyond such limits and not within the limits of the criminal

**Ordinary Original
Jurisdiction of
the High Court.**

jurisdiction of any other High Court or Court established by competent legislative authority for India as the said High Court of Judicature at Fort William in Bengal shall have criminal jurisdiction over at the date of the publication of these presents.

Jurisdiction as to persons. "Cl. 23. And We do further ordain that the said High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original criminal jurisdiction, shall be empowered to try all persons brought before it in due course of law.

Extraordinary Original Criminal Jurisdiction. "Cl. 24. And We do further ordain that the said High Court &c, shall have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any Court now subject to the superintendence of the said High Court, and shall have authority to try at its discretion any such person brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf.

Regulation of proceedings. Criminal Cases. Cl. 38. And We do further ordain that the proceedings in all criminal cases which shall be brought before the said High Court of Judicature at Fort William in Bengal, in the exercise of its ordinary original criminal jurisdiction and also in all other criminal cases over which the said High Court had jurisdiction immediately before the publication of these presents, shall be regulated by the procedure and practice which was in use in the said High Court immediately before such publication, subject to any law which has been made or may be made in relation thereto by competent legislative authority for India ; and that the proceedings in all other criminal cases shall be regulated by the Code of Criminal Procedure, prescribed by an Act passed by the Governor-General in Council, and being Act No. XXV of 1861, or by such further or other laws in relation to criminal procedure as may have been, or may be made by such authority as aforesaid.

Powers of the Indian Legislature preserved. Cl. 44. And We further ordain and declare that all the provisions of these our Letters Patent are subject to the Legislative powers of the Governor-General in Council and also of the Governor-General in Council under S. 71 of the Government of India Act, 1915 and also of the Governor-General in case of emergency under S. 72 of that Act and may be in all respects amended and altered thereby. [Substituted for the corresponding Clause 44 by S. 1 (d) of the Letters Patent of March 11, 1919.]

The Letters Patent for the High Courts of Madras and Bombay are *mutatis mutandis* in almost the same terms. Similar provisions are contained in Clauses 15, 16, 17, 29 and 35 of the Letters Patent of the Allahabad High Court (dated March 17, 1866) ; in Clauses 15, 16, 17, 30 and 41 of the Letters Patent (dated February 9, 1916) of the Patna High Court ; in Clauses 15, 16, 17, 28 and 37 of the Letters Patent (dated March 21, 1919) of the Lahore High Court ; and in Clauses 21, 22, 23, 36 and 47 of the Letters Patent (dated November 11, 1922) of the Rangoon High Court. Clause 28 of the Letters Patent of the Lahore High Court and Clause 36 of the Letters Patent of the Rangoon High Court, which two were established last, distinctly prescribe

that the proceedings in all such cases brought before the High Court shall be regulated by the Code of Criminal Procedure; and as we have already seen, the Criminal Procedure Code now prescribes the proceedings in trials of all offences, subject to certain exceptions, it follows that all trials before the High Court, in virtue of its ordinary original jurisdiction, and extraordinary original jurisdiction, over persons, are trials under Chapter XXIII of the Cr. P. Code and therefore must be held by Jury. It should be remembered that the High Courts at Presidency Towns were the successors of the old Supreme Courts, and as the Charters of the Supreme Courts originally gave them original criminal jurisdiction over all European British subjects outside Presidency Towns, wherever they might be found, the High Courts inherited that jurisdiction from them and it was preserved in their Letters Patent with its special procedure subject to legislative enactment by the Indian Legislature. With the development of the Code of Criminal Procedure the necessity for such jurisdiction and special procedure has almost disappeared, and hence we find in the recently established High Courts the provision mentioned above.

Lastly, there may be proceedings in the High Court against persons subject to its jurisdiction, on information by the Advocate-General (See S. 194 (2) (a)). The proceedings to be taken upon every such information are such as may be lawfully taken in the case of similar informations filed by Her Majesty's Attorney-General so far as the circumstances of the case and the practice and procedure of the High Court will admit (S. 194 (2) (b)). The Attorney-General is a great officer of State appointed by Letters Patent and the legal representative of the Crown in the Supreme Court. He is the highest officer in rank among the different persons by whom prosecutions are conducted in Court. He exhibits informations, prosecutes for the Crown in criminal matters and in revenue causes and grants fiats for writs of error. In many cases his consent is necessary before penalties can be recovered²¹. A criminal information lies for misdemeanour only, and not for treason or felony, and hence it can be filed without any enquiry by the Grand Jury. As the officer acts merely officially, the bill he exhibits is by way, not of petition or complaint but, of information. The objects of the Sovereign's own criminal information, filed ex-officio by his Attorney-General, are properly such enormous misdemeanour as peculiarly tend to disturb or endanger his Government, or to molest or affront him in the regular discharge of his royal functions²². Some of these are :—(1) seditious or blasphemous libels or words; (2) seditious riots not amounting to high treason; (3) libels upon the King's ministers, the Judges or other high officers, reflecting upon their conduct in the execution of their official duties; (4) obstructing such officers in the execution of their duties; (5) obstructing the King's officers in the collection &c of the revenues; and (6) against Magistrates and officers themselves for bribery, or for other corrupt or oppressive conduct²³. When the information is filed, the truth of the facts alleged must afterwards be tried by a Petty Jury of the county wherein the offence arose (unless, indeed, the case be of such importance as to require to be tried at the bar); and it is so tried either by a common or special Jury, like an ordinary action; and if the verdict be for the Crown, the defendant is afterwards brought up for judgment

21. Wharton's Law Lexicon.

22. Stephen's Commentaries, IV. p. 307.

23. Archbold's Criminal Pleading, Evidence and Practice, Pt. I, Ch. I, Sec. 12.

before the High Court ²⁴. The trial, on such information, in the Indian High Courts will similarly be by Jury only.

An ex-officio information under S. 194 should contain a statement of the charge ascertained and detailed as an indictment ; allegations as to the opinion of the executive likely to be very prejudicial to the accused should not be included. The High Court of Patna appears to have jurisdiction to try persons against whom the Government Advocate has exhibited an ex-officio information ²⁵. The Judicial Committee however remarked in the case, in which it was so held tentatively, that the procedure in any event was novel and this unusual procedure should not be resorted to in cases which could be tried by the ordinary procedure ²⁶.

As to the origin of trial by Jury before the High Courts, see Chapter V of Part I. *ante*.

4. What Trials before the High Court may or may not be by Jury.

The second paragraph of S. 267 of the Code enacts that in all criminal cases transferred to a High Court under the Code or under the Letters Patent of any High Court the trial may, if the High Court so directs, be by Jury.

Under S. 526 Sub-Sec. (1) (e) (iii) the High Court may order that any particular criminal case be transferred to and tried before itself, and Sub-Section (2) provides that when the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in S. 267, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn. S. 527 gives power to the Governor-General in Council to transfer a criminal case from one High Court to another High Court. When a case is thus transferred to a High Court, it may direct the trial of the case to be held by a Jury, even if the case in the original Court was not triable by Jury. If the case in the original Court is triable by Jury then it shall be triable by Jury before the High Court, as it is bound to observe in the trial the same procedure under Sub-Section (2) of S. 526²⁷.

In the case, however, of a person, subject to the Naval Discipline Act or to the Army Act or to the Air Force Act, accused of any such offence as is referred to in proviso (a) to S. 41 of the Army Act, which the High Court, on the application of the Advocate-General, orders that it shall be committed for trial to or be transferred to itself, the High Court shall proceed to try the case by Jury (S. 526 A). This is a new Section and was inserted by Act XII of 1923, S. 32.

Cl. 29 of the Letters Patent of the Calcutta High Court lays down :—

“And We do further ordain that the said High Court shall have power to direct the transfer of any criminal case or appeal from any Court to any other Court of equal or superior jurisdiction and also direct the preliminary investigation or trial of any criminal case by any officer or Court otherwise competent to investigate or try it, though such belongs, in ordinary course, to the jurisdiction of the said Court.”

High Court may direct the transfer of a case from one Court to another.

24. Stephen's Commentaries, IV. pp. 307, *et Seq.*

25. Dwarkanath (1933) 37 C. W. N. 514 (P. C.) : 57 C. L. J. 199 : 1933 A. L. J. 645 : 35

Bom. L. R. 507 : 64 M. L. J. 466 : 34 Cr. L. J. 322.

26. *Ibid.*

27. Kashinath (1897) Rat. 927.

tion of some other officer or Court." See the corresponding Clause 29 of the Letters Patent of the Madras and the Bombay High Courts, Clause 22 of the Letters Patent of the Allahabad, Patna and Lahore High Courts and Clause 28 of the Letters Patent of the Rangoon High Court.

5. What Trials before a Court of Session shall be by Jury.

As to what is a Sessions Court, see notes under "Court of Session" *ante*. S. 268 of the Code enacts that all trials before a Court of Session shall be either by Jury or with the aid of assessors, and S. 269 enacts that the Local Government may be order direct that the trial of all offences or of any particular class of offences before any Court of Session shall be by Jury in any district, and may revoke or alter such order. It follows, therefore, that in any district, for which there is no such order as aforesaid, the trial before the Court of Session shall ordinarily be with the aid of assessors. Thus, no person outside the Presidency towns has any right to be tried by a Jury, unless that right is conferred by the Executive Government. The provisions of the Code, taking away trial by Jury even in the case of an European subject, are not *ultra vires* under the proviso to S. 22 of the India Council Act (24 & 25 Vict C. 67).²⁸ But there is one important reservation on this point. In a warrant case, whether triable by a Court of Session or not, to which the provisions of Chapter XXXIII, relating to cases in which European and Indian British subjects are concerned, have been held to apply, the accused must be committed to the Court of Session. That Court will proceed as if the accused had required to be tried in accordance with the provisions of S. 275 : that is to say, the trial will be by Jury the majority of which shall be of the same nationality as the accused, whether the case is ordinarily triable by Jury or not (See S. 446 (2)).

Again, a person may be tried by Jury for an offence in one district while he may not be so triable for the same offence in another district.

What offences in a particular district are triable by Jury depends, therefore, on the Notification issued by the Local Government in the Official Gazette. The particular class of offences, which may be directed to be so tried, is not limited to the classification of offences contained in the Penal Code, or in the Code of Criminal Procedure, e. g., cognizable offences, bailable offences. Offences may be classified according to the persons who commit them, or according to the person or property against whom or which they are committed, or in regard to the particular occasion in connection with which they are committed. The fact of offences having been committed by old offenders, or members of criminal tribes, or against women, or against public property would afford reasonable ground for a classification, and so would offences connected with an outbreak directed against a certain section of the community.²⁹

Jury trial ceases in a district transferred to an area where the trial is with the aid of

28. Barindra. (1909) 37 C. 467 : 14 C. W. N. 1114 : 11 Cr. L. J. 453 : 7 I. C. 359 [follow-

ing *Kartie Chauder Dutt*, the facts of which will be found in 37 C. at p. 516].

29. Ganapathi (1900) 23 M. 632.

assessors.³⁰ In S. 269 of the Code, the words "trial shall be by Jury in any district" mean that the trial shall be by Jury in any district when so ordered by Notification and not that the trial shall be by Jury of offences committed in any district ; and the result of this interpretation is that a case may be transferred to a Jury district from a non-jury district and *vice versa*, though the effect of such transfer may be to alter the mode of trial by Jury or by the aid of assessors.³¹

Reference in a Notification to an offence under S. 436 I. P. C., includes a case under S. 436 read with S. 149 I. P. C.³²

Under Sub-S. (2) of S. 269, the Local Government may also order that in any district the trial by Jury with reference to particular offences shall, if the Judge so directs of his own motion or on the application of a party, be by Jurors summoned from a special Jury list ; and may revoke or alter such order. There was no provision for the appointment of Special Jurors until 1896 ; such a provision was for the first time made by Act XIII of 1896. It introduced the second clause of S. 269 and the fourth proviso to S. 276, and by these two provisions it prescribed the appointment of Special Jurors in the Muffasil. This Act also made the other provisions for the preparation of Special Jury list and so forth.³³

6. Trial at one Trial of Offences some of which are triable by Jury and some by Assessors.

Sub-S. (3) of S. 269 of the Code enacts that when the accused is charged at the same trial with several offences of which some are and some are not triable by Jury, he shall be tried by Jury for such of those offences as are triable by Jury, and by the Court of Session with the aid of the Jurors as assessors for such of them as are not triable by Jury. A Sessions Judge has a discretion, under S. 235, to try simultaneously cases regarding different offences committed in the same transaction, and consequently he can, in the same trial, try such offences, some of which may be triable by Jury and others with the aid of assessors³⁴. The accused were tried at one trial for offences under SS. 302 and 201 I. P. C. ; the former was triable by Jury and the latter with the aid of assessors. The trying Judge took the verdict of the Jury on the charge of murder, which was one of 'not guilty' and although he did not agree with it, he accepted it and acquitted the accused. The Judge next took the opinion of the Jurors as assessors on S. 201 I. P. C. which was that the accused was 'not guilty' of the offence, and he disagreed with the opinion and convicted and sentenced the accused : *Held*, on appeal, that the Judge was right in acting upon his own view of the evidence and convicting the accused.³⁵ The Judge is bound to constitute all the members of the Jury as assessors for trying the non-jury offences ; and when

30. Khoodeeram (1867) 8 W. R. 39 ; Bhagedhone (1867) 8 W. R. 53.

31. Jumo (1916) 18 Cr. L. J. 51 : 10 S. L. R. 154 : 37 I. C. 35 ; Durga Churn (1908) 8 C. L. J. 59 : 8 Cr. L. J. 121.

32. Ramsunder (1925) 5 P. 238 : 27 Cr. L. J. 512 : A. I. R. 1926 P. 253 : 93 I. C. 976.

33. Shaheb Ali (1931) 58 C. 1272 : 35 C. W. N. 711 : 54 C. L. J. 307 : 33 Cr. L. J. 129 : A. I. R. 1931 C. 793 : 135 I. C. 435.

34. Sami (1890) 13 M. 426 ; Ramakrishna (1903) 26 M. 598.

35. Mhasku (1934) 37 Bom. L. R. 109 : A. I. R. 1935 B. 165.

only two of them were constituted assessors, it was held that the Judge acted illegally and the convictions on the non-jury charges were set aside³⁶. This Sub-Section is not applicable when all the charges are triable by Jury and there is no charge triable with the aid of assessors ; or *vice versa*³⁷. In the Criminal Procedure Codes of 1861 and 1872 there was no provision analogous to this. The practice then was that the jurors were empanelled as assessors in respect of the charges they were not competent to try as jurors ; so, if the jurors as assessors convicted on any of the charges not triable by Jury their verdict was considered as the opinion of the assessors ; and if the Judge disagreed with it he was not to refer the matter to the High Court but to pronounce his own judgment on it and pass orders accordingly.³⁸ Then in the Code of 1882, S. 269 prescribed that when on a trial some charges were triable by a Jury, and others were not ordinarily so triable, all the charges should be tried by a Jury ; so that if there was a conviction on any of the charges not ordinarily triable by a Jury, the conviction was treated as the verdict of the Jury and not the opinion of the assessors and the Judge could not pronounce his own judgment and order acquittal³⁹. By S. 558 of the Code of 1882 the provisions of that Act were to be applied, as far as might be, to all cases then pending in any Criminal Court on the 1st January 1883. But where S. was tried by the Sessions Court in December 1882 on charges, some of which were triable by assessors and others by a Jury, but before the trial was concluded the Code of 1882 came into force, it was held by virtue S. 6 of the General Clauses Act, 1868 that the trial must be conducted under the rules of procedure in force at the commencement of the trial⁴⁰. The said Section was altered and brought into its present form by Act X of 1886, S. 9 and re-enacted in the present Code of 1898. In cases under Sub-S. (3) it is desirable that the Judge should explain clearly to the Jury and assessors the double capacity in which they are acting.

It has been noted before that this Sub-Section is not applicable where the charges framed are all triable by Jury and there is no charge triable with the aid of assessors⁴¹. It applies when there are both kinds of charges ; and in such a case it would be wrong on the part of the Judge to empanel a Jury to try the charge which is triable by Jury and, on the conclusion of the trial, take their verdict on that charge only and not their opinions as assessors on the charges triable with the aid of assessors⁴². It has been held that a failure to

36. Panjari (1911) 21 M. L. J. 520 : 12 Cr. L. J. 239 : 10 I. C. 281. [following Ramakrishna 26 M. 593].

37. Gulabchand (1925) 27 Bom. L. R. 1416 : 27 Cr. L. J. 650 : A.I.R. 1926 B. 134 : 94 I. C. 602 ; Changouda (1920) 45 B. 619 : 22 Bom. L. R. 1241 : 22 Cr. L. J. 51 : 59 I. C. 195 ; Abdul Hamid (1926) 6 P. 208 : 27 Cr. L. J. 1100 : A.I.R. 1927 P. 13 : 97 I. C. 364.

38. Srinivasachari (1883) 6 M. 336 [Under the Code of 1861 several Circular Orders were issued by the Calcutta High Court observing that where a Sessions Judge had tried with a Jury a case not triable by Jury and had agreed with the verdict, the trial was irregular but the

verdict should be taken as the opinion of the assessors.—See Cr. Lett. No. 890, d/6th September 1865, 4 W. R. Cr. Lett. 2 ; Cr. Lett. No. 187, d/5th March 1866, 5 W. R. Cr. Lett. 3 ; Cr. Lett. No. 303, d/5th April 1866, 5 W. R. Cr. Lett. 7 ; Cr. Lett. No. 1058, d/9th September 1867, Cr. Lett. 21].

39. Lakshmana (1885) 9 M. 42.

40. Srinivasachari (1883) 6 M. 336.

41. Gulabchand (1925) 27 Bom. L. R. 1416 : 27 Cr. L. J. 650 : A.I.R. 1926 B. 134 : 94 I. C. 602.

42. In re Sivaga (1903) 2 Weir 334 ; Anga Valayan (1898) 22 M. 15.

take the opinion of all the assessors is not an omission or irregularity within the meaning of S. 537 which can be cured but that it vitiates the conviction as to the offence triable by the assessors⁴³. In another case it has been held that it vitiates the whole trial⁴⁴. The Sub-Section does not apply also to a case when all the offences charged are triable with the aid of assessors, and the Judge finds a minor offence (triable by Jury) established which was not charged; he can convict on that offence in the same trial under S. 231⁴⁵ or empanel a Jury and try it separately⁴⁶. But when at a trial by Jury for an offence under S. 397 I. P. C. and with the aid of assessors for an offence under S. 307 I. P. C. the accused was acquitted of those offences, but the Judge convicted the accused of the offence of causing hurt by a dangerous weapon under S. 324 I. P. C. without requiring the Jury as assessors to give their opinion with reference thereto and recording such opinion as required by S. 309 Cr. P. C. : *Held*, that the conviction is bad and must be set aside and a retrial must be held by the Sessions Judge with the aid of assessors on a charge duly framed under S. 324 I. P. C. only, as it must be held that the accused stands acquitted on the charges under the other sections.⁴⁷ Where the accused were acquitted of the offences triable by Jury and convicted of those triable with the aid of assessors and the conviction is set aside, a trial for the latter only is not illegal if they did not object to it at the time.⁴⁸

In a joint trial such as is contemplated in Sub-S. (3) of S. 269 the order in which the verdict and the opinion are to be taken, i.e., which should be taken first, very often depends upon the nature of the case and the offences charged; as where one charge is included in the other. Thus, when the charges were under S. 395 I. P. C. (dacoity) and S. 396 I. P. C. (dacoity with murder), the first being triable with Jury and the second triable with assessors, the Judge should first place before the Jury only the evidence as to S. 395 and after a verdict of guilty put to them as assessors the evidence on the other charge.⁴⁹ The accused were charged under Ss. 395 and 396 I. P. C. and some of them under S. 412 I. P. C. The charge under S. 396 was triable with the aid of assessors, the other by Jury. There could be no sort of doubt but that an offence under S. 396 had been committed, and the only question to be tried was whether the accused were among the offenders. In other words, the preliminary register would have shown the Sessions Judge that the accused were either guilty under S. 396 or they were not guilty of dacoity at all. That being so, the Sessions Judge should have simply tried the accused with the aid of assessors under S. 396, and the minor charge under S. 412 might well have been reserved for a separate trial, after the result of the trial under S. 396 was known. Had the circumstances been different, so as to give ground for supposing that the accused might be guilty of dacoity without being guilty also under S. 396, then the Sessions Judge might properly have empanelled a jury, and, on the

43. Ramakrishna (1903) 26 M. 598; Parbhushankar (1901) 25 B. 680 (F. B.)

44. Abdul Hamid (1926) 6 P. 208 : 27 Cr. L. J. 1100 : A. I. R. 1927 P. 13 : 97 I. C. 364.

45. Changouda (1920) 45 B. 619 : 22 Bom. L. R.

1241 : 22 Cr. L. J. 51 : 59 I. C. 195. See also Ramakrishna (1903) 26 M. 598.

46. Krishna Ayyan (1901) 24 M. 641.

47. In re Sivaga (1903) 2 Weir 334.

48. Abdul Hamid (1926) 6 P. 208 : 27 Cr. L. J. 1100 : A. I. R. 1927 P. 13 : 97 I. C. 364.

49. Dakshinamurthy (1900) 2 Weir 517.

conclusion of the trial, he might under S. 269 Cr. P. C. have asked their opinion as assessors as to the guilt of the accused under S. 396 I. P. C. and then he should have found the accused guilty or not guilty under that Section. If he had found them guilty, he should have proceeded to conclude the case by passing sentence. If, however, he found them not guilty, he should have then charged the Jury with respect to the dacoity under S. 395 I. P. C. and should have taken their verdict thereon as a Jury.⁵⁰ On charges under S. 457 I. P. C. (triable by Jury) and S. 380 I. P. C. (triable with assessors), the opinion of the Jurors as assessors should be taken first on the latter charge.⁵¹

7. Validity of Trials wrongly held by Jurors or Assessors.

As to the validity of a trial, when it has been held by a Jury when it should have been held with the aid of assessors or *vice versa*, S. 536 of the Code provides :—

(1) If an offence triable with the aid of assessors is tried by a Jury the trial shall not on that ground only be invalid.

(2) If an offence triable by a Jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

A distinction has thus been made between the two cases. Provision for taking objection has been made only in a case triable by a Jury, but not in a case triable with the aid of assessors. Such a provision is probably unnecessary in those cases referred to in Sub-S. (3) aforesaid, because the Jurors themselves can be treated as assessors. The objection must be taken before the Court records its finding, i.e., before judgment is pronounced and signed under S. 367. If such objection is taken, a new trial should be held by a Jury. An objection, if not taken before the Judge, cannot be afterwards taken on appeal.⁵² If by mistake an accused is tried without a Jury for an offence for which under the law he is entitled to be tried by a Jury, the defect is curable by S. 536 (2) of the Code.⁵³ If a trial be held in spite of the objection, it would be illegal.⁵⁴ But in the case (1) above, if the objection was taken but was erroneously overruled, the trial will not be invalid on that ground ;⁵⁵ and where the objection was taken after the delivery of the verdict and allowed and the Judge disagreeing with that verdict and treating the verdict as the opinion of the assessors, convicted the accused, it was held that the conviction was bad, in as much as the case was validly "tried by Jury" within the meaning of S. 536, and the trial was complete when the Jury had returned their verdict ; and that the Judge was bound, under the circumstances, either to give judgment in accordance with the verdict, or, if he disagreed with it, to submit the case for orders of the

50. Anga Valayan (1898) 22 M. 15.

51. Devu (1892) Rat. 600.

52. Ganapathi (1900) 23 M. 632 ; Krishna Ayyan (1901) 24 M. 641.

53. Sonia Koshti (1926) 28 Cr. L. J. 177 ; A. I. R. 1927 N. 117 ; 99 I. C. 849.

54. Ramsundar (1925) 5 P. 238 ; 27 Cr. L. J. 512 ; A. I. R. 1926 P. 253 ; 93 I. C. 976. Under

the Code of 1861, a trial with the assessors of an offence triable by Jury was invalid altogether. See *In re Bipro* (1863) 1 R. J. P. J. 124.

55. Pattikadan (1902) 26 M. 243 ; Parbhushankar (1901) 25 B. 680 (F. B.) ; Karuppa Thivan (1930) M. W. N. 776.

High Court, as provided by SS. 306 and 307 of the Code.⁵⁶ A Jury properly trying a charge, on acquitting on that charge, can convict for a minor offence under the provisions of S. 238 triable with assessors, and the Judge can treat it as a verdict instead of trying the offence with assessors.⁵⁷ When the accused does not intervene at the time when the verdict of the Jury, or their opinions as assessors, has or have to be taken, and get the procedure applicable to trials by assessors enforced, he cannot, on appeal, complain of the Judge's omission to take the opinions of the jurors as assessors and to write a judgment.⁵⁸

But though a trial may not be invalid under the provisions of S. 536,⁵⁹ the wrong procedure becomes a matter of importance in the hearing of the appeal, for when a trial has been held by a Jury, the appeal shall be on a matter of law only (S. 418). Section 536 only says that the trial is "not invalid" that is, not treated as a nullity, and not that it should be treated for all purposes as a valid Jury trial.⁶⁰ So, when a trial had been erroneously held by a Jury, the Calcutta High Court heard the appeal on the evidence, the Sessions Judge's charge to the Jury being treated as his judgment⁶¹. But the Bombay High Court has refused to adopt this practice, holding that S. 418 in declaring that where the trial was by Jury, the appeal shall be on a matter of law only, means where the trial was in fact held by a Jury, not where the trial ought to have been by Jury, and that in such a case an appeal lies on a matter of law only⁶². It has been held by the Madras High Court that if there is a possibility of the Jury having gone wrong on the facts, the only alternative would be to order a re-trial if desired by the accused or the prosecution; and if not so desired, then to treat the charge as the judgment in the case and the verdict of the Jury as the opinion of assessors, following the cases reported in 18 W. R. 59 and 24 W. R. 30⁶³. If in such a case the Judge disagrees with the verdict of the Jury, he cannot, after the verdict is delivered, treat it as the opinion of the Jurors as assessors and pronounce judgment and sentence, but must refer the matter to the High Court under S. 307; in such a case the conviction and sentence were set aside and the Sessions Judge was directed to proceed accordingly⁶⁴.

The question whether a trial was held by a Jury or with assessors, is one of fact and it does not matter what the parties take it to be.⁶⁵ Where the Judge charges the Jury on the

56. Surja Kurmi (1898) 25 C. 555. See also cases under the corresponding Section, 233 Cr. P. C. of 1872; Mohim (1878) 3 C. 765; Doorga (1875) 24 W. R. 30; Norkoo (1872) 18 W. R. 59; Bhootnath (1879) 4 C. L. R. 405. See also Jeyram (1899) 23 B. 696.

57. Pattikadan (1902) 26 M. 243; Arumuga (1927) 29 Cr. L. J. 351; A. I. R. 1928 M. 275; 108 I. C. 214; Narayan Singh (1928) 31 Cr. L. J. 557; A. I. R. 1929 N. 295; 123 I. C. 477.

58. Mavsing (1909) 33 B. 423; 11 Bom. L. R. 350; 10 Cr. L. J. 30; 2 I. C. 480.

59. Luckhy (1875) 24 W. R. 18; Bhootnath (1879) 4 C. L. R. 405; Devu (1892) Rat. 600; Lalbu

(1898) Rat. 961; Jeyram (1899) 23 B. 696; Parbhushankar (1901) 25 B. 680 (F. B.); Mavsing (1909) 33 B. 423; 11 Bom. L. R. 350; 10 Cr. L. J. 30; 2 I. C. 480.

60. Parbhushankar (1901) 25 B. 680, 693 (F. B.).

61. Abdool Kurreem (1870) 14 W. R. 32; Norkoo (1872) 18 W. R. 59; Doorga (1875) 24 W. R. 30.

62. Parbhushankar (1901) 25 B. 680 (F. B.).

63. In re Muthusami (1895) 1 Weir 432; 26 M. 243 n.

64. Surja Kurmi (1898) 25 C. 555. See also Jeyram (1899) 23 B. 696.

65. Mavsing (1909) 33 B. 423; 11 Bom. L. R. 350; 10 Cr. L. J. 30; 2 I. C. 480.

case, in which both classes of offences were being tried under S. 269 (3), as a whole, and directs them to give, and takes, a verdict on each charge including those triable with assessors, the trial is by Jury,⁶⁶ unless possibly, if, before passing final orders, he treats the verdict as their opinions and proceeds to judgment.⁶⁷ It is within the competence of the Sessions Judge to take into consideration the entire evidence produced in the case in dealing with the charge triable by him with the aid of the assessors inspite of the fact that the evidence might have been disbelieved by the Jury who were dealing with the minor charge. So far as the case triable with the aid of assessors is concerned, the Sessions Judge is the sole Judge of the facts and the opinion of the Jury does not count.⁶⁸ That the accused has a right to claim the opinion of the Judge on the facts is illustrated by the decisions under the Code of 1861. Thus, in respect of a case trial by a Jury in a district from which Jury trial had been withdrawn, it thus held under the Code of 1861 that the trial must be quashed and the accused must be tried anew according to law, the reason being given as follows :—"Where a trial is by Jury the decision on facts is exclusively in the hands of the Jury, but when it is with the assessors the decision is vested exclusively in the Judge, and in this case tried as aforesaid the accused had no decision from the Judge to which he was entitled."⁶⁹

8. What Trials before a Court of Session shall be with the aid of Assessors.

All trials under the Code of Criminal Procedure held before a Court of Session, in the absence of a Notification under S. 269 of the Code, must be with the aid of assessors. This form of trial was first introduced in Bengal by Reg. VI of 1832 (extended to Madras by Act VII of 1843) to aid European Judges, deficient in knowledge of native customs, habits and modes of thought. There is no analogy between assessors in civil cases in England and in criminal trials in India.⁷⁰ The contrast between *trial by Jury* and *trial with the aid of assessors* is that in the former the Jury is the real tribunal but is aided by the Judge, and in certain matters is directed by the Judge, but in the latter the Judge is the sole tribunal aided by the assessors. The assessors take no part in the judgment whatever and they are not responsible for it and have nothing to do with it ; the Judge is the sole judge of law and fact and the responsibility of the decision rests only with him. Assessors do not like the Jury form a body, each acts and gives his opinion individually.⁷¹ Under Act VII of 1843, S. 42 and the Code of 1861, S. 324, they were "members of the Court," but the words were omitted in the subsequent Codes. But though assessors may not be members of the Court in the sense that they are not responsible for the judgment and sentence, they are members of the Court for adjudging evidence, for the tribunal consists in such matters of the Judge and the Jury, when the trial is by Jury, and the Judge and assessors when that mode of trial is adopted⁷². In this sense the Sessions Court is composed of both, and if the Judge records evidence after discharging the assessors there is a

66. Mavsingh (1909) 33 B. 423 : 11 Bom. L. R. 350 : 10 Cr. L. J. 30 : 2 I. C. 48 ; Parbhushankar (1901) 25 B. 680 (F. B.) ; Bhootnath (1879) 4 C. L. R. 405.

67. Parbhushankar (1901) 25 B. 680 (F. B.)

68. Ramdas (1932) 35 Cr. L. J. 1349 : A. I. R. 1934 A. 61 : 1934 A. L. J. 852 : 151 I. C. 442

[relying on Manindra 41 C. 754 : 18 C. W. N. 580 : 15 Cr. L. J. 402 : 23 I. C. 1002].

69. Khoodeeram (1867) 8 W. R. 39.

70. Tierumal (1901) 24 M. 523, 543.

71. Ibid, pp. 536-539.

72. Ashootosh (1878) 4 C. 483 (F. B.) ; Sagal (1893) 21 C. 642.

material irregularity vitiating the trial.⁷³ Also, if the Judge makes a local inspection under S. 539 B of the Code in the absence of the assessors the inspection note must be ruled out.⁷⁴ There is no distinction, as to the procedure, between a trial by Jury and a trial with assessors, except as to summing up and the mode of taking the verdict and opinions, the departure of the ways is at the latter point⁷⁵. The scheme of the Code shows that, it is less advantageous to be tried with assessors than by Jury. It is open to the Sessions Judge to add an alternative charge but it is not a proper exercise of discretion to withdraw a charge thought proved by the committing Magistrate and thus put the accused to a disadvantage by substituting another, so that he might be deprived of the right of trial by Jury⁷⁶. Where there has been a commitment for the trial of charges, some of which are triable by a Sessions Judge with a Jury and others triable by a Magistrate, the fact that during the trial the charges which were triable by the Sessions Court are withdrawn is not a ground for setting aside the order of commitment and taking away the accused's right to a trial by Jury, without his consent⁷⁷. An objection taken under Sub-S. (2) of S. 536 renders the trial invalid as the accused has been deprived of a right or a valuable privilege which he may, up to the last moment, preserve : but if he has obtained the privilege in the converse case he will not take objection⁷⁸.

Where on charges triable with assessors only, the facts indicate the possibility of a minor offence triable by Jury, it should be charged to enable objection to trial with the former being taken⁷⁹.

As to the effect of a trial by Jury in a case triable with assessors, see Notes under the preceding heading.

In the Burma Frontier Districts, any trial before the Court of Session save where the Local Government otherwise directs, may at the discretion of the presiding Judge be without Jury or assessors.—See Burma Reg. 1 of 1925, Sch. Cl. 1.

9. Public Prosecutor,—His Appointment, Powers and Duties.

The definition of "Public Prosecutor" as given S. 4 (t) of the Code of Criminal Procedure is as follows :—

"Public Prosecutor" means any person appointed under S. 492, and includes any person acting under the directions of a Public Prosecutor and any person conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction."

S. 492 states :—

"(1) The Governor-General in Council or the Local Government may appoint,

73. Jaisukh (1920) 43 A. 125 : 19 A. L. J. 1 : 22 Cr. L. J. 127 : 59 I. C. 559 ; Ram Lal (1893) 15 A. 136.

74. Raj Bahadur (1934) 11 O. W. N. 1309 : 35 Cr. L. J. 1496 : A. I. R. 1934 O. 499 : 152 I. C. 103.

75. Mavsing (1909) 33 B. 423 : 11 Bom. L. R. 350 : 10 Cr. L. J. 30 : 2 I. C. 480.

76. Ramsundar (1925) 5 P. 238 : 27 Cr. L. J. 512 : A. I. R. 1926 P. 253 : 93 I. C. 976.

77. Mannatha (1926) 31 C. W. N. 144 : 28 Cr. L. J. 141 : A. I. R. 1927 C. 119 : 99 I. C. 349.

78. Parbhushankar (1901) 25 B. 630 (F. B.)

79. Changouda (1920) 45 B. 619 : 22 Bom. L. R. 1241 : 22 Cr. L. J. 51 : 59 I. C. 195.

generally, or in any case, or for any specified class of cases in any local area one or more officers to be called Public Prosecutors.

(2) The District Magistrate, or, subject to the control of the District Magistrate, the Sub-divisional Magistrate, may, in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Local Government may prescribe in this behalf, to be Public Prosecutor for the purpose of any case".

Sub-S. (2), as it now stands, is the result of an amendment made by S. 133 of Act XVIII of 1923. Previous to the said amendment, the District Magistrate or the Sub-divisional Magistrate was empowered, under the circumstances, as stated, to appoint a person as Public Prosecutor for the purpose of conducting a case committed for trial to the Court of Session, and if the person so appointed was a Police officer, then that Police officer was not to be of a rank below that of Assistant District Superintendent. Now he is empowered to appoint a Public Prosecutor in any case and not merely in the Sessions Court only. A District Magistrate can now appoint the Court Inspector a Public Prosecutor and direct him to withdraw any case from the Court of a Magistrate, which he could not do before.⁸⁰

There is no prosecutor in India in the English sense of one who prefers a bill before the Grand Jury and generally without whose appearance no bill can be found; the prosecutor here is merely the person instituting proceedings by complaint or information over which, as a general rule, he has subsequently no control, and in which his concurrence is in no way necessary.⁸¹

COURT INSPECTOR AND SUB-INSPECTOR—The Court Inspector is not an official of the Court, but a Police officer deputed to conduct cases.⁸² Under Government Notification the Court Inspectors and Sub-Inspectors are Public Prosecutors⁸³. But an officer of Police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted (S. 495 (4)).

LEGAL REMEMBRANCER—The office of Legal Remembrancer can be traced to the creation of the post of 'Remembrancer of the Criminal Court,' on 6th April 1781 to supervise the criminal monthly returns when the administration of criminal justice was in the hands of the Nabob Nazim of Bengal. [See Reg. IX of 1793 S. 1; and Field's Introduction to Regulations (1875) P. 140]. The office of the Superintendent and Remembrancer of Legal Affairs was created by Reg. VIII of 1816, S. 2, and abolished by Reg. XIII of 1829. It was, however, revived in 1844 or 1845 by an executive or administrative order.⁸⁴ By

80. Ram Govind V. Lallu (1923) 46 A. 18 : 21 A. L. J. 855 : 25 Cr. L. J. 970 : A. I. R. 1924 A. 203 : 81 I. C. 618.

81. Madhub (1873) 21 W. R. 13. See Chinna Kaliappa (1905) 29 M. 126.

82. Jogjiban (1909) 13 C. W. N. 861 : 9 C. L. J. 663 : 10 Cr. L. J. 125 : 2 I. C. 681.

83. Notification dated 6th July 1907, published in

the Calcutta Gazette dated 10th July 1907, Pt. I, p. 1162. See Sital Singh (1918) 46 C. 700 : 30 C. L. J. 255 : 21 Cr. L. J. 5 : 5 I. C. 53.

84. Motilal (1913) 41 C. 173 ; Tularam (1918) 46 C. 544 : 23 C. W. N. 96 : 20 Cr. L. J. 170 : 49 I. C. 490.

Notification dated 24th June 1886, the Legal Remembrancer of Bengal was appointed an *ex officio* Public Prosecutor in all Mofussil cases before the Appellate Side of the High Court.⁸⁵ He has been empowered also to appear in Calcutta cases by Notification dated 7th May 1915⁸⁶. He cannot, however, appear and act for the Crown side⁸⁷. The Legal Remembrancer, Bengal, is by executive order, also Judicial Secretary to Government⁸⁸.

STANDING COUNSEL—The Standing Counsel is the Crown Prosecutor for Government in all criminal cases arising within the original jurisdiction of the High Court. He is authorised to conduct all the cases at the High Court Sessions, except in certain cases in which the Advocate-General is required to appear on behalf of Government, when he acts as the Advocate-General's junior. He may also appear and conduct Government prosecutions before the Presidency Magistrates, the Government Solicitor furnishing him with the necessary briefs. He is also an *ex-officio* Public Prosecutor for the purposes of the Criminal Procedure Code, and amongst other matters, when directed by the Government to do so, presents appeals to the High Court from orders of acquittal or revision petitions against dismissal or discharge made by Presidency Magistrates.

APPOINTMENT OF PUBLIC PROSECUTOR—The Local Government may appoint a special Public Prosecutor in any case, in any local area, where there is already a general Public Prosecutor, for it can appoint more than one such officer for any local area. The District Magistrate, or subject to the control of the District Magistrate the Sub-divisional Magistrate, cannot appoint a Public Prosecutor generally for any local area; but he can do so for the purposes of any case arising within his District or Sub-division, when there is no Public Prosecutor or when the Public Prosecutor could not be present. Where a Public Prosecutor had been appointed and the Local Government directed another officer to present an appeal, the latter was not competent to do so under S. 417 if he was not also appointed a Public Prosecutor under S. 492.⁸⁹ Where on the petition of the brother of a murdered man, the District Magistrate granted him permission to support the conviction in the appellate Court and he engaged a pleader for that purpose, it was held that order on the brother's petition did not constitute such pleader a Public Prosecutor under S. 492.⁹⁰ A Public Prosecutor should have no personal interest in the case he conducts; so a Magistrate, who in the first instance has tried the accused, should not be appointed Crown Prosecutor to conduct an inquiry subsequently directed in the same case.⁹¹ A Public Prosecutor, therefore, derives his office from appointment by Government, District Magistrate or Sub-divisional Magistrate.

A person conducting a prosecution cannot be considered a Public Prosecutor unless he is so appointed. No doubt, the definition of "Public Prosecutor" includes any person acting

85. Calcutta Gazette dated 30th June 1886, Pt. I., p. 783; Gaya Prasad (1913) 41 C. 425 : 18 C. W. N. 279 : 18 C. L. J. 519 : 15 Cr. L. J. 46 : 22 I. C. 190.

86. Calcutta Gazette dated 19th May 1915, Pt. I., p. 954; Tularam (1918) 46 C. 544 : 23 C. W. N. 96 : 20 Cr. L. J. 170 : 49 I. C. 490.

87. Motilal (1913) 41 C. 173, 201, 235.

88. Ibid., 235.

89. Gaya Prasad (1913) 41 C. 425 : 18 C. W. N. 279 : 18 C. L. J. 519 : 15 Cr. L. J. 46 : 22 I. C. 190.

90. Akbar, P. R. No. 29 of 1886.

91. Kashinath, (1871) 8 B. H. C. R. 126. See also Mohesh (1870) 4 B. L. R. App. 1.

under the directions of a Public Prosecutor. But it means simply this, that when a Public Prosecutor is in charge of a case and he directs a person to do some acts in connection with that case, his acts are to be considered as the acts of the Public Prosecutor. S. 493 Cr. P. C. says that "if any private person instructs a pleader to prosecute in any Court any person in any such case (i. e. a case of which the Public Prosecutor has charge), the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions." Thus the conduct of a Crown case is vested in the Public Prosecutor, and the private pleader is subordinate to him, and may instruct and assist him; the pleader's right is subordinate to that of the Crown, and when there is conflict between the private prosecutor and the Public Prosecutor in any matter (such as a case of transfer), the right of the latter as representing the Crown should prevail⁹². If they do not work in harmony, the private Counsel may retire or the Public Prosecutor may take the sole conduct of it.⁹³ Where the service of the Counsel has once been accepted, his assistance is not excluded in summing up the case for the prosecution or in giving the reply⁹⁴. S. 495 of the Code and S. 145 (2) of the Railway Act IX of 1890 do not affect S. 493; the Public Prosecutor has the charge of the prosecution and the Railway pleader must act under his direction⁹⁵. The word 'act' at the end of S. 493 does not mean something other than examining or cross-examining witnesses or addressing the Court and is not used in any technical sense in distinction to the words "appear and plead" in the opening part of the Section⁹⁶. But where a Public Prosecutor is not in charge of the case, a person, conducting a prosecution with the permission of the Magistrate inquiring into or trying that case, does not occupy the position of a Public Prosecutor and he cannot exercise the power conferred by S. 494 of the Code to withdraw from the prosecution. Under S. 495 (2) Cr. P. C. only the Advocate-General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government to conduct a prosecution shall have the power to withdraw from the prosecution.⁹⁷ Thus a private Counsel⁹⁸, a Police officer not permitted to conduct the prosecution⁹⁹ or an Assistant Police Prosecutor not specially authorised¹⁰⁰ cannot do so. A Court Inspector, not appointed to conduct a prosecution and who took no part in conducting it (the prosecution being conducted by a private Vakil with permission), could not withdraw the case, under S. 495, under the District Magistrate's order.¹⁰¹ Otherwise, the private prosecutor has substantially the same rights as the Crown.¹⁰²

92. *Jamuna v. Rudra* (1919) 4 P. L. J. 656 : 20 Cr. L. J. 648 : 52 I. C. 424 [Citing *Burdett v. Abbot* (1811) 4 East 154, 162].

93. *In re Narayan* (1874) 11 B. H. C. R. 102.

94. *Ibid*, 103.

95. *Sheikh Makbul* (1925) 27 Cr. L. J. 313 : A. I. R. 1926 P. 755 : 92 I. C. 697.

96. *Vaz* 1930 M. W. N. 769.

97. *Nga Maung Gyi v. Nga Lu Gale* (1908) 10 Cr. L. J. 14 (Bur) [dissenting from *Nga Aung Nyun* 2 L. B. R. 165]; *Lakshmana v. Keelan* (1910) 11 Cr. L. J. 722 (M.) : 8 I. C. 867.

98. *Nga Maung Gyi v. Nga Lu Gale* (1908) 10 Cr. L. J. 14 (Bur).

99. *Chockanada v. Salambura* (1909) 10 Cr. L. J. 501 (M.) : 4 I. C. 132.

100. *Kabul* (1933) A. I. R. 1933 S. 345 : 27 S. L. R. 331 : 147 I. C. 131.

101. *Ram Govind v. Lallu* (1923) 46 A. 88 : 21 A. L. J. 855 : 25 Cr. L. J. 970 : A. I. R. 1924 A. 203 : 81 I. C. 618.

102. *Ramchandra* (1895) Rat. 776.

There is, however, nothing in S. 495 which shows that the prosecution cannot be taken out of the hands of the pleader conducting the prosecution and assigned to some other person who is not the Public Prosecutor.¹⁰³ The permission under S. 495 (1) should not be given indiscriminately ; in trial for grave offences, it is the duty of the District Magistrate and not of a private individual to see that the Crown case is properly conducted ; merely because the accused was an influential man and it was alleged that the Crown case was being mis-handled and the petitioner offered to conduct the case, it is no reason for granting the permission.¹⁰⁴ Excise officers are not included in the expression of "Officer of Police" in S. 495(4).¹⁰⁵

POWERS OF PUBLIC PROSECUTOR—S. 493 of the Code states as follows :—"The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal, and if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution and the pleader so instructed shall act therein, under his directions".

The Criminal Procedure Code does not recognise a private prosecutor, who is a complainant, as a party to the case. Ordinarily the only persons who are recognised by the Code as parties to a criminal case are the persons who have the right to be heard, i. e., persons who have the right to control the proceedings. These are the Crown, the accused, and the parties engaged in conducting certain proceedings of a *quasi civil* nature which should be treated as criminal cases within the meaning of the Code¹⁰⁶. All offences affect the public as well as the individual injured, and in all prosecutions the Crown is the prosecutor. The term 'party' in its technical sense finds no place in the Criminal Procedure Code. Every case is conducted by the Public Prosecutor, and if any private person instructs a pleader to prosecute, that pleader acts under the directions of the Public Prosecutor. The proceeding is always treated as a proceeding between the Crown and the accused. The Crown either proceeds itself, or lends the sanction of its name. The offence is dealt with as an invasion of the public peace, and not a mere contention between the complainant and the accused. There is only one instance where criminal proceeding is deemed purely a proceeding between the prosecutor and the accused, and this exception was made for a special purpose and required the intervention of the Legislature to make it law—Viz., the Explanation to S. 33 of the Evidence Act¹⁰⁷. The Crown is in theory the prosecutor of all offences¹⁰⁸, and a party to all criminal trials¹⁰⁹. The Crown can also refrain from instituting a prosecution ; the discretion to do so is inherent in the authority having power to prosecute and no law

103. Ghadially (1924) 18 S. L. R. 30 ; 25 Cr. L. J. 571 ; A. I. R. 1925 S. 99 ; 81 I. C. 59.

104. Kabul (1933) A. I. R. 1933 S. 345 ; 27 S. L. R. 331 ; 147 I. C. 131.

105. Gopal Shinde (1933) 57 B. 441 ; 35 Bom. L. R. 376 ; 34 Cr. L. J. 905 ; A. I. R. 1933 B. 234 ; 145 I. C. 158.

106. Jamuna v. Rudra (1919) 4 P. L. J. 656 ; 20 Cr. L. J. 648 ; 52 I. C. 424.

107. Murarji (1888) 13 B. 389 ; Sibani v. Bhagwat (1925) 5 P. 25 ; 27 Cr. L. J. 235 ; A. I. R. 1926 P. 176 ; 92 I. C. 219.

108. Gaya Prasad v. Bhagat (1908) 35 I. A. 189 ; 30 A. 525 (P. C.).

109. Vijayaraghava (1883) 2 Weir 193.

prevents him from determining and stating how it will be exercised in a particular contingency¹¹⁰. Thus a Government Notification of immunity to bribers for giving evidence was held legal¹¹¹. The Public Prosecutor is the representative of the Crown¹¹². Prosecution is not private in India¹¹³. In cognizable cases conducted by the Public Prosecutor, the private prosecutor has no control¹¹⁴. But when not so conducted, a private prosecutor may conduct the prosecution in a Magistrate's Court with the permission of the Magistrate¹¹⁵. In practice, the duty of conducting the prosecution is often left to the person aggrieved who *pro hoc vice* represents the Crown¹¹⁶. In serious cases the Public Prosecutor should conduct the prosecution, the complainant's interest in them being small¹¹⁷.

Hence S. 270 Cr. P. C. enacts that in every trial before a Court of Sessions the prosecution shall be conducted by a Public Prosecutor.

The Public Prosecutor may appear and plead without written authority, but his rights are restricted to an inquiry, trial or appeal. S. 440 makes it discretionary with a Court exercising powers of revision to hear a party or his pleader, except in a case in which it is contemplated to make an order to the prejudice of an accused person (S. 439 (2)). S. 493 applies to prosecutions and does not debar an application in revision by a private party¹¹⁸. The Crown has a right to be heard by Counsel or pleader to support the prosecution in the original and appellate Courts.

A Public Prosecutor should be allowed the utmost freedom in marshalling his evidence¹¹⁹. It is the duty of the Court to administer justice according to law and not to deal with matters entirely within the discretion of the Crown or its officers, or to require the parties to act on extraneous grounds according to its own extra-judicial view as to the propriety of instituting complaints through personal motives, or as to the morality of the prosecution, e.g., of a receiver after using his evidence to convict the thief, and examination of the latter as witness to convict the former. What is legal the Judge may ascertain; but whether the Crown is morally justified in calling a witness or prosecuting a person, is for the prosecution and not for him to decide¹²⁰. Government is the prosecutor in Sessions Courts and the complainant is merely a witness¹²¹. A Counsel instructed by a private person cannot conduct a prosecution on behalf of the Government in a trial before a Court of Session without being specially empowered by the District Magistrate; such a person can attend and

110. *Har Prasad* (1922) 21 A. L. J. 42; 25 Cr. L. J. 497; A. I. R. 1923 A. 91; 77 I. C. 961.

111. *Ibid.*

112. *Muraji* (1888) 13 B. 389.

113. *Balbhadar v. Badri* (1926) 30 C. W. N. 866 (P. C.); 43 C. L. J. 521; A. I. R. 1926 P. C. 46.

114. *Gulli v. Narain* (1923) 2 P. 708; 25 Cr. L. J. 446; A. I. R. 1924 P. 283; 77 I. C. 734.

115. S. 495 Cr. P. C. *Chinna Kaliappa* (1905) 29 M. 126. See *per Macpherson, J.* in *Siban Rai*

v. Bhagwat (1925) 5 P. 25; 27 Cr. L. J. 235; A. L. R. 1926 P. 796; 92 I. C. 219.

116. *Gaya Prasad v. Bhagat* (1908) 35 I. A. 189; 30 A. 525 (P. C.).

117. *Muneshar v. Raghubir* (1913) 11 A. L. J. 741; 14 Cr. L. J. 555; 21 I. C. 155.

118. *Maung Htin v. Maung Po.* (1926) 4 R. 471; 28 Cr. L. J. 219; A. I. R. 1927 R. 74; 99 I. C. 1019.

119. *Stanton* (1892) 14 A. 521.

120. *Ram Chandra* (1895) Rat. 786.

121. *Kally Shahoo* (1865) 3 W. R. Cr. Lett 18.

watch the case on behalf of his client, but he cannot conduct the prosecution¹²². As to the position of a private pleader permitted to appear for the prosecution, *see Notes under the preceding heading*.

A Public Prosecutor may withdraw from the prosecution. S. 494 Cr. P. Code states :—

“Any Public Prosecutor may, with the consent of the Court, in cases tried by Jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried ; and upon such withdrawal,—

(a) If it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences ;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences,”

The Section has been amended in two respects by S. 134 of Act XVIII of 1923. Previously, only the Public Prosecutor appointed by the Government had such a power of withdrawal ; now any Public Prosecutor, including one appointed by the District or Sub-divisional Magistrate may withdraw from the prosecution. Secondly, a Public Prosecutor can withdraw “either generally or in respect of any one or more of the offences” ; it was previously held that the Public Prosecutor, if he wanted to withdraw, must withdraw in respect of all the offences charged, that is to say he was not competent to withdraw only one of the charges.²³ A person committed to the Court of Session cannot be discharged under S. 494, for a commitment presupposes the framing of charges. If a commitment be bad in law, it should be referred to the High Court so as to be quashed under S. 215, but if the prosecution be withdrawn there must be an acquittal.¹²⁴

After the discharge of an accused approver under S. 494 he is competent to be a witness and his evidence is admissible against other accused persons.¹²⁵ The Court in which the prosecution is withdrawn under S. 494 should be careful in recording the order of discharge or acquittal resulting from it so that its proceedings should be complete, if it be necessary to examine the person so discharged or acquitted as a witness against others ; so when this had been omitted, it was held that the particular person could not be examined as a witness under a conditional pardon (S. 337) and his evidence was rejected as inadmissible.¹²⁶ But in a later

122. Cheytun, Oudh Sess. Cas. No. 31.

123. The following cases are now obsolete ; Madho (1886) 8 A. 291 (F. B.) ; Ramakrishna (1882) 2 Weir 653 ; Afiluddi (1905) 2 C. L. J. 18. The amendment follows Sheobaran v. Shibu (1904) 2 A. L. J. 30.

124. Sivarama (1888) 12 M. 35.

125. Kasem Ali (1919) 47 C. 154 : 31 C. L. J. 192 : 21 Cr. L. J. 386 : 55 I. C. 994 ; Govind (1915) 18 Bom. L. R. 266 : 17 Cr. L. J. 256 : 34 I. C. 976 ; Sital Singh (1918) 46 C. 700 : 30

C. L. J. 255 : 21 Cr. L. J. 5 : 54 I. C. 53. [following Akhoy Kumar 45 C. 720 : 22 C. W. N. 405 : 19 Cr. L. J. 663 : 45 I. C. 999] ; Mahadev (1926) 27 Cr. L. J. 807 : A. I. R. 1926 N. 426 : 95 I. C. 471.

126. Banu Sing (1905) 33 C. 1353 : 10 C. W. N. 962 : 4 Cr. L. J. 145. See also Hanmanta (1877) 1 B. 610 ; Asghar Ali (1879) 2 A 260 ; Mahandu (1919) 1 L. 102 : 21 Cr. L. J. 599 : 57 I. C. 167.

case, it has been held that notwithstanding the omission to record a formal order of discharge, the person ceased to be on trial as soon as the prosecution against him was withdrawn, and that being so he became a competent witness.¹²⁷ In the absence of a formal withdrawal of the prosecution, the fact that the Public Prosecutor allowed the Vakil to conduct the prosecution in what was practically a private complaint will not entitle the accused to be acquitted.¹²⁸

S. 494 does not apply to proceedings under S. 107, or where the party is not directed to appear at all.¹²⁹ A withdrawal before service of summons was held legal.¹³⁰

The Section does not contemplate the case of withdrawal by the Public Prosecutor after the conviction by the first Court and in the appellate stage of the case.¹³¹

THE WITHDRAWAL MUST BE WITH THE CONSENT OF THE COURT—S. 494, however does not expressly require the Court to give any reason for consenting to the withdrawal, nor is there any provision which compels a Court to write a reasoned judgment establishing the propriety of the order of acquittal; where no question of public justice appears to be involved, the High Court will not interfere except on a properly constituted appeal by the Local Government. The Crown is the prosecutor and the custodian of the public peace, and if it decides to let the offender go, no other aggrieved party can be heard to object on the ground that he has not taken his full toll of private vengeance.¹³² The Rangoon High Court, while holding that it will not interfere with an order of acquittal in revision, was of opinion that a Sessions Judge acted wrongly in recording no reasons for giving his consent to the withdrawal.¹³³ The Calcutta High Court as also some other High Courts have, however, held that an order giving consent to a withdrawal under S. 494 is a judicial one, and should set out reasons so that the High Court on revision may be in a position to determine whether the lower Court has exercised its discretion properly, and where this was not done the High Court may set aside the order giving permission to withdraw.¹³⁴ The test is whether in giving consent for

Sherati Sheikh (1914) 18 C. W. N. 1213 : 15 Cr. L. J. 693 : 26 I. C. 141 ; Muhammad Nur (1909) 7 A. L. J. 86.

128. Gopal Naick (1930) 54 M. 593 : 32 Cr. L. J. 690 : A. I. R. 1931 M. 770 : 131 I. C. 176.
In re Muthia (1911) 35 M. 315 : 14 Cr. L. J. 559 : 21 I. C. 159.

130. Dudekula (1917) 40 M. 976 : 19 Cr. L. J. 501 : 45 I. C. 261.

Ananta Lal (1927) 46 C. L. J. 121 : 28 Cr. L. J. 833 : A. I. R. 1927 C. 816 : 104 I. C. 449.

Gulli Bhagat v. Narain Singh (1923) 2 P. 708 ; 25 Cr. L. J. 446 : A. I. R. 1924 P. 283 : 77 I. C. 734 [dissenting from Umesh v. Satis (1917) 22 C. W. N. 69 : 26 C. L. J. 208 : 18 Cr. L. J. 886 : 41 I. C. 998 ; Jagat v. Kalimuddi (1921) 26 C. W. N. 880 : 24 Cr. L. J. 229 : 71 I. C. 693 ; and following Faujdar v.

Kasi (1914) 42 C. 612 : 19 C. W. N. 184 : 16 Cr. L. J. 122 : 27 I. C. 186 ; In re Sadayan (1908) 11 Cr. L. J. 193 : 4 I. C. 1126 ; Lakshmi v. Mohammad (1932) 33 Cr. L. J. 337 : A. I. R. 1932 L. 368 : 135 I. C. 714].

133. Abdul Gani v. Abdul Kader (1923) 1 R. 756 : 25 Cr. L. J. 1106 : A. I. R. 1924 R. 168 : 81 I. C. 930. See Mul Singh (1922) 24 Cr. L. J. 433 : A. I. R. 1923 L. 163 : 72 I. C. 593, Dipchand (1929) 31 Cr. L. J. 684 : A. I. R. 1930 S. 156 : 124 I. C. 378.

134. Raman (1929) 56 C. 1023 : 33 C. W. N. 468 : A. I. R. 1929 C. 319 ; Jagat v. Kalimuddi (1921) 26 C. W. N. 880 : 24 Cr. L. J. 229 : 71 I. C. 693 ; Rajoni v. Idris (1921) 48 C. 1105 : 25 C. W. N. 615 : 34 C. L. J. 51 : 22 Cr. L. J. 760 : 64 I. C. 280. See also Suganchand v. Chunilal (1922) 24 Cr. L. J.

withdrawal of prosecution the Court has been influenced by circumstances which ought not to have been considered. The belief by the Magistrate that the prosecution case is true does not necessarily affect a proceeding under S. 494. In a suitable case the Court may still give consent to the Public Prosecutor to withdraw, if it finds that there are good reasons for doing so ; consent is not to be given as a matter of course, neither is it to be unreasonably withheld.¹³⁵ That the prosecution case is weak is not by itself sufficient to justify an withdrawal ; the Section does not intend to limit the materials, on which action may be taken, to matters appearing on the record only ; it contemplates action to be taken, more often than not, upon circumstances extraneous to the record : inexpediency of a prosecution for reasons of State, necessity to drop the case on grounds of public policy, credible information having reached the Government as to the falsity of the evidence by which the prosecution is supported and other matters of that description.¹³⁶ Before accepting the reasons given by the Public Prosecutor for the withdrawal, the Sessions Judge should examine the commitment record for himself.¹³⁷ Withdrawal for the purpose of securing the accused as a witness is legal.¹³⁸

The case may be withdrawn against one of several accused.¹³⁹ In a recent Full Bench decision of the Calcutta High Court (*Harihar Singh*, (1936) 40 C. W. W. 876) it has been *held by a majority* (Derbyshire C. J., Panckridge, M. C. Ghose and Bartley JJ.) that the Public Prosecutor may withdraw from the prosecution of any person under S. 494 (a) Cr. P. C. for the purpose of obtaining his evidence against others placed on trial along with him and can do so even in a case in which S. 337 Cr. P. C. applies ; Mukerji J. *held* that the Court should not allow such withdrawal for obtaining the evidence where S. 337 Cr. P. C. may be availed of. Also *held per majority*, that the person discharged under S. 494 (a) cannot be put back into the proceedings to be tried along with the co-accused but may be tried, if he is to be tried, in other proceedings on the same charge ; *held per* Mukerji J. that the withdrawal under S. 494 (a) is intended to be unconditional, and a revival of the proceedings against the person concerned in the view that his evidence has not been satisfactory, would be most improper and unseemly although such course is not forbidden by any express provision in the Statute.

361 : A. I. R. 1923 N. 260 : 72 I. C. 361 ;
 Bepin v. Hari (1922) 24 Cr. L. J. 5 : 71 I. C.
 53 ; In re Sadayan (19.8) 11 Cr. L. J. 193 :
 41 C. 1126 ; Mohiuddin (1928) 25 N. L. R.
 6 : 30 Cr. L. J. 872 : A. I. R. 1929 N. 133 :
 118 I. C. 63 ; Gombai (1931) 26 S. L. R. 67 :
 32 Cr. L. J. 449 : A. I. R. 1932 S. 92 : 137
 I. C. 344 ; Kanhaiyalal v. Baijnath (1932) 29
 N. L. R. 201 : 34 Cr. L. J. 519 : A. I. R. 1933
 N. 78 : 143 I. C. 77.

135. Shar Singh (1931) 59 C. 275 : 36 C. W. N.
 16 : 54 C. L. J. 253 : 33 Cr. L. J. 3 : A. I. R.
 1931 C. 607 ; 134 I. C. 1045.

136. Giribala v. Madar Gazi (1931) 36 C. W. N.

928 : 56 C. L. J. 79 : 34 Cr. L. J. 433 ; A. I.
 R. 1932 C. 699 : 142 I. C. 891.

137. Rajani v. Idris (1921) 48 C. 1105 : 25 C. W. N.
 615 : 34 C. L. J. 51 : 22 Cr. L. J. 760 : 64 I. C.
 280 ; Gulli Bhagat v. Narain Singh (1923) 2 P.
 708 : 25 Cr. L. J. 446 : A. I. R. 1924 P. 283 : 77
 I. C. 734.

138. Hussein Haji (1900) 25 B. 422 ; Sudam (1931)
 34 Cr. L. J. 675 : A. I. R. 1933 C. 148 : 144 I.
 C. 74 [following Raman. (1929) 56 C. 1023 :
 33 C. W. N. 468 ; A. I. R. 1929 C. 319]

139. Banu Singh (1906) 33 C. 1353 : 10 C. W. N.
 962 : 4 Cr. L. J. 145 ; Dy. Leg. Remembrance
 v. Banu Singh (1906) 5 C. L. J. 224 : 5 Cr.
 L. J. 142 ; Hussein Haji (1900) 25 B. 422.

The reason that an accomplice materially helped the Police in exposing the operations of the gang is a good ground for withdrawing the case against him.¹⁴⁰

The Advocate General only can withdraw a prosecution without giving any reason and without the consent of the Court.¹⁴¹

S. 493 says that the Public Prosecutor can appear and plead in a case of which he is in charge. Where, therefore, the Court permitted the prosecuting officer on a District Magistrate's order to withdraw a case, in which the complainant was given permission to conduct the prosecution and be responsible for its conclusion and in which the complainant had closed his evidence and the charge was framed, and in which the Inspector did not appear, and the accused was acquitted: it was held that the order of acquittal was an improper one and should be set aside.¹⁴² A withdrawal by a joint petition signed by a Public Prosecutor appointed under S. 492 (1) and a private pleader not so appointed, is legal.¹⁴³

Where a charge containing more heads than one is framed against the same person and when a conviction has been had on one or more of them, the complainant or the officer conducting the prosecution may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord may stay the inquiry into, or trial of, such charge or charges (S. 240). The complainant may withdraw his complaint in a summons case with the permission of the Court (S. 248). He may control the prosecution indirectly by his absence (Ss. 247, 259) or by offering no evidence.

DUTIES OF A PUBLIC PROSECUTOR—A Public Prosecutor must endeavour to perform his duties with that calmness and impartiality which should ever characterise a Public Prosecutor. The Counsel for the prosecution is to be assistant to the Court in the furtherance of justice, and not to act as Counsel for any particular person or party. He should not by his statement of the case aggravate the case against the prisoner, or keep back a witness because his evidence may weaken the case for the prosecution. His only object should be to aid the Court in discovering truth. A Public Prosecutor should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part no unseemly eagerness for, or grasping at, conviction.¹⁴⁴ The only legitimate object of a prosecution is to secure, not a conviction but, that justice be done. The prosecutor is not, therefore, free to choose how much evidence he will bring before the

140. *Mahadeo* (1926) 27 Cr.L.J. 807 : A. I. R. 1926 N. 426 : 95 I. C. 471.

141. *Abdul Gani v. Abdul Kader* (1923) 1 R 756 : 25 Cr.L.J. 1106 : A.I.R. 1924 R. 168 : 81 I. C. 930 [following *Umesh v. Satis* (1917) 22 C. W. N. 69,71 : 26 C. L. J. 208 : 18 Cr. L. J. 886 : 41 I. C. 993].

142. *Ram Gobind v. Lallu Singh* (1923) 46 A 88 : 25 Cr.L.J. 970 : A. I. R. 1924 A. 203 : 81 I. C.

618. See also *Sher Singh v. Jitendra* (1931) 59 C. 275 : 36 C.W.N. 16 : 54 C. L. J. 253 : 33 Cr. L. J. 3 : A. I. R. 1931 C. 607 : 134 I. C. 1045.

143. *Sital Singh* (1918) 46 C. 700 : 30 C. L. J. 255 : 21 Cr. L. J. 5 : 54 I. C. 53.

144. *Per Westropp C. J. in Kashinath* (1871) 8 Bom. H. C. R. 126.

Court. He is bound to produce all the evidence in his power directly bearing on the charge. It is *prima facie* his duty, accordingly, to call those witnesses who prove their connection with the transactions in question and also must be able to give important information. The only thing which can relieve the prosecutor from calling such witnesses is the reasonable belief that, if called, they would not speak the truth. If such witnesses are not called without sufficient reason being shown (and the mere fact of their being summoned for the defence seems by no means necessarily a sufficient reason), the Court may properly draw an inference adverse to the prosecution. There is no corresponding inference against the accused. He is merely on the defensive, and owes no duty to anyone but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses of the case for the prosecution, or to call witnesses or to meet the charge in any other way he chooses; and no inference unfavourable to him can properly be drawn, because he takes one course rather than another.¹⁴⁵ A Full Bench of the Allahabad High Court has held that in a trial before a Court of Session or a High Court, the Public Prosecutor conducting the case for the Crown is not bound to call as a witness for the Crown or to put into the witness-box for the purpose of cross-examination any of the witnesses appearing in the calendar as witnesses for the Crown whose evidence is, in his opinion, unnecessary.¹⁴⁶ In delivering the judgment of the Full Bench, Edge C. J. said: "It is the duty of a Public Prosecutor to conduct the case for the Crown fairly. His object should be, not to obtain an unrighteous conviction, but, as representing the Crown, to see that justice is vindicated; and in exercising his discretion as to the witnesses whom he should or should not call he should not refuse to call or put into the witness-box for cross-examination a truthful witness returned in the calendar as a witness for the Crown, merely because the evidence of such witness might in some respect be favourable to the defence. If a Public Prosecutor is of opinion that a witness is a false witness or his likely to give false testimony if put into the witness-box, he is not bound, in our opinion, to call that witness or to tender him for cross-examination. In cases in which a prisoner is undefended in a Sessions trial, the presiding Judge should, in our opinion, look at the deposition of any witness appearing in the calendar as a witness for the Crown, and not called on behalf of the Crown or tendered for cross-examination, in order to ascertain whether he should not himself take action under S. 540 Cr. P. C. All witnesses returned in the calendar as witnesses for the Crown are, whether they are called or not by the Crown, bound to be in attendance until the conclusion of the trial, unless they are released from attendance by order of the Court; and before releasing them from attendance, the Court should satisfy itself that their evidence will not be required either by the prosecution or the defence. We have used the term "Public Prosecutor" in the sense as it is defined in the Code". The prosecution is not bound to tender a witness, examined before the lower Court but upon whom the prosecution cannot put reliance, for cross-examination or do more than have him present in Court for the accused to call him or not

145. Per Wilson J. in *Dhunno Kazi* (1881) 8 C. 121, 124; 10 C. L. R. 151 [See *Ram Ranjan* (1914) 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170; 27 I. C. 554, in which the

word 'favour' as appearing in the report was corrected].

146. *Durga* (1893) 16 A. 84 (F. B.)

as they may think fit and the Court may call a witness when there is a matter necessitating enquiry or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence; but the Court should not call any witness on whose evidence it could not place reliance, at any rate in a case in which the prisoner is defended by Counsel.¹⁴⁷ The purpose of a criminal trial is not to support, at all costs, a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the Police but the Crown and this duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position; the guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tests of any one else, and it is undoubtedly the duty of a Public Prosecutor in a capital case to have placed before the trial Court the testimony of all available eye-witnesses.¹⁴⁸ Blackburn J. observed:¹⁴⁹—"It has always hitherto been the supposition in the administration of criminal justice, as a rule, that the prosecuting Counsel was in a kind of judicial position; that while he was there to conduct his case he was to do it at his discretion, but with a feeling of responsibility—not as if trying to obtain a verdict, but to assist the Judge in fairly putting the case before the Jury and nothing more". It is the duty of the prosecution to place before the Court the complete truth, and not to suppress parts favourable to the accused.¹⁵⁰ It is the duty of the Public Prosecutor to disclose to the defence the existence of any fact that may help the accused in his defence.¹⁵¹ If the Public Prosecutor knows of a witness who favours the accused it is his duty to call the witness himself or to see that the defence is supplied with the name of the witness and given an opportunity of calling him.¹⁵² The prosecuting Inspector or Government Pleader in the trial Court, and the trial Judge, do not, any of them, discharge their duties, if they are merely content with getting recorded and recording such evidence as the Police may put before the Court. It is the duty of all of them to apply some intelligence, all the intelligence they can, to the problems that arise in the case and towards securing all possible evidence on material facts. They must examine the motives and relations between the parties and insist upon their actions, where those actions are material, being disclosed.¹⁵³ A Public Prosecutor should not show any animosity or pertinacity.¹⁵⁴ He should point out glaring discrepancies between evidence on trial and that before the committing

147. *Kaliprosonno* (1836) 14 C. 245.

148. *Ram Ranjan* (1914) 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170; 27 I. C. 554. See also *Fateh Chand* (1916) 44 C. 477 (F. B.); 21 C. W. N. 33; 24 C. L. J. 400; 18 Cr. L. J. 385; 38 I. C. 945; *Amritalal* (1915) 42 C. 957; 19 C. W. N. 576; 21 C. L. J. 331; 16 Cr. L. J. 437; 29 I. C. 513; *Nga Lu* (1933) 6 R. 254; 35 Cr. L. J. 792; A. I. R. 1933 R. 378; 143 I. C. 810; *Ghirrao* (1933) 10 O. W. N. 1108; 34 Cr. L. J. 1009; A. I. R. 1933 Q. 265; 145 I. C. 470.

149. *Barens* (1865) 4 F. & F. 842.

150. *Ram Ranjan* (1914) 42 C. 422; 19 C. W. N. 28; 16 Cr. L. J. 170; 27 I. C. 554.

151. *Vasudeo Balwant* (1932) 56 B. 434; 33 Cr. L. J. 613; A. I. R. 1932 B. 279; 138 I. C. 503.

152. *Nga Lu* (1933) 6 R. 254; 35 Cr. L. J. 792; A. I. R. 1933 R. 378; 148 I. C. 810.

153. *Karan Singh* (1927) 26 A. L. J. 92; 29 Cr. L. J. 26; A. I. R. 1928 A. 25; 106 I. C. 442.

154. See the remarks of C. J. in *Imam Ali's Case* (1903) 8 C. W. N. xvii.

officer.¹⁵⁵ He should not indirectly suggest to a prosecuting witness an explanation of an inconsistent statement.¹⁵⁶ He should not threaten or intimidate the accused or his pleader.¹⁵⁷ He is not to have an unseemly eagerness for grasping at conviction.¹⁵⁸ The Court is entitled to call upon the parties to a case to make full and true disclosure of all the facts, within their knowledge, which have a bearing on the question to be determined, and to visit with punishment any attempt to evade the duty cast upon them. In a criminal case the Crown or the Local Government occupies no higher position than that of a litigant and cannot claim any privilege which is denied to a private prosecution, unless there is a special legislative authority for it. Where the allegation was that the approvers though nominally in jail were really in police custody: *Held*, that it is the duty of the Local Government to supply through the Public Prosecutor or Government Advocate the necessary information asked for by the Court regarding the custody of the approvers.¹⁵⁹ The prosecution in cocaine, as in other cases, is to be conducted fairly so as to give no cause for complaint.¹⁶⁰

It is the duty of a pleader to assist the Court in the attainment of justice, whether he be appearing for the prosecution or the defence; and when he finds that the Court is not complying with the provisions of S. 360 Cr. P. C., it is his duty to draw the Court's attention to the fact.¹⁶¹

155. Gunsha (1873) 20 W. R. 38.

156. Param Sukh (1925) 23 A. L. J. 1037 : 27 Cr. L. J. 11 : A. I. R. 1926 A 147 : 91 I. C. 43.

157. Mahammad Mian (1919) 20 Cr. L. J. 566 : 52 I. C. 54.

158. Chandeker (1924) 7 N. L. J. 155 : 26 Cr. L. J. 163 : A. I. R. 1924 N. 243 : 83 I. C. 723 : Nogendranath (1915) 19 C. W. N. 923 : 21 C. L. J. 396 : 16 Cr. L. J. 576 : 30 I. C. 128 : Robert Stuart Wauchop (1933) 38 C. W. N.

187 : 58 C. L. J. 405 : 35 Cr. L. J. 156 : A. I. R. 1933 C. 800 : 146 I. C. 767.

159. Kundan Lal (1931) 12 L. 623 : 32 Cr. L. J. 909 : A. I. R. 1931 L. 473 : 132 I. C. 515.

160. Batasi (1926) 53 C. 706 : 30 C. W. N. 854 : 27 Cr. L. J. 1329 : A. I. R. 1926 C. 1163 : 98 I. C. 401.

161. Fakir Bux (1926) 20 S. L. R. 261 : 27 Cr. L. J. 833 : A. I. R. 1926 S. 244 : 95 I. C. 753.

CHAPTER II.

B. Commencement of Proceedings—Ss. 271-273 Cr. P. C.

S. 271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

S. 272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case :

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

S. 273. (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

List of Headings :-

1. Commencement of proceedings in the Court of Session or High Court.
2. Preliminary objections to proceeding with the trial.
3. Postponement or transfer of trial on the ground of local feeling.
4. Reading out and explaining the charge to the accused.
5. Taking accused's plea.
6. Plea of guilty.
7. Conviction on a plea of guilty.
8. When the accused does not plead or refuses to plead or claims to be tried.—Pleas.—(S. 272).
9. When jurors or assessors are to be chosen (S. 272).
10. Trial by same Jury or assessors of several cases in succession.—Cross-cases.—(Proviso to S. 272).
11. Staying proceedings upon a charge or portion of a charge (S. 273).

COMMENTARY

1. Commencement of Proceedings in the Court of Session or High Court.—

These proceedings arise from the commitments made to the said Courts by Magistrates under S. 213 or by Civil or Revenue Courts under S. 478 Cr. P. Code. The law contemplates two proceedings in connection with offences triable by Court of Session or High Court : First, a preliminary proceeding, the object of which is to inquire whether the accused is to be charged or discharged and if the accused is charged then to frame the charge

or charges. No plea of the accused on the charge is taken but he is simply committed for trial to the Court of Session or High Court. If the commitment be not, in the meantime quashed by the High Court under S. 215 on a point of law, then the second proceeding begins, the object of which is to find out whether the accused is to be convicted or acquitted.¹

Public notice is given by the Sessions Judge of the dates on which he will hold the periodical Sessions respectively. At each periodical Sessions, all persons awaiting trial shall be brought before the Judge in open Court ; and if the Government Prosecutor is not prepared to go to trial in any particular case, he should be required to show cause, properly supported, why the accused should not be acquitted and released, the accused himself being also heard in answer to such cause shown. The Sessions Judge is not authorised to postpone, to a subsequent Session, cases of which he has received notice before commencement of the Session next ensuing, on the ground that the days which he has assigned for that particular Session have been filled up. The number of days devoted to Sessions duties must depend upon the number of cases committed in due time. All commitments of which he receives timely notice before the commencement of the Session should be disposed of at that Session, unless of course, there is some good reason for postponement in a particular instance.²

The proceedings commence when the Judge has taken his seat on the bench, the case is called on, the accused enters the dock, and the representatives of the prosecution and for the defence, if the accused be defended, are present in Court for the hearing of the case.³ The first step in the proceeding, unless any preliminary objection is taken, is the reading out of the charge or charges and explaining them to the accused.

The hearing of the case commences with the reading out of the charges⁴, but this is not the commencement of the 'trial'. S. 268 says that all trials before a Court of Session shall be either by Jury, or with the aid of assessors. So the 'trial' actually commences when the jurors or assessors have been chosen (See S. 286). The 'trial' does not begin with the reading of the charge as the assessors or the jurors are chosen under S. 272, only if the accused does not plead to the charge or claims to be tried.⁵ Unless the accused person claims to be tried (S. 272) there need not be any trial either by the Jury or with the aid of assessors ; the Judge may dispose of the case himself (S. 271 (2)).⁶ After the Jurors and assessors are chosen, the Court shall proceed to try the case. The proceedings that

1. Narayanaswamy (1909) 32 M. 220 (F. B.) : 9 Cr. L. J. 192 ; 1 I. C. 228 ; Kallappa (1926) 50 B. 695 ; 28 Cr. L. J. 5 ; A. I. R. 1927 B. 21 ; 99 I. C. 37.

2. Prinsep's Cr. P. Code, 15th Ed. (1933) P. 418.

3. See *per* Maclean C. J. in Gomer (1898) 25 C. 863.

4. Kali Mudaly (1911) 35 M. 701 ; 12 Cr. L. J.

271 : 10 I. C. 380 ; Muhammad Yusuf (1931) 58 C. 1214 ; 35 C. W. N. 497 ; 32 Cr. L. J. 667 ; A. I. R. 1931 C. 341 ; 131 I. C. 142

Bastiano (1890) 15 B. 514 ; Fitzmaurice (1925) 6 L. 262 ; 27 Cr. L. J. 421 ; A. I. R. 1925 L. 446 ; 93 I. C. 149.

See Srikant Charal (1868) 2 B. L. R. 23 (F. B.) : 10 W. R. 431. (F.B).

take place before the actual trial correspond to the 'arraignment' in English Law. Arraignment is not a part of the trial.⁷ An "arraignment" takes place before the Jury is sworn and consists of three parts : (1) the calling the prisoner to the bar by name ; (2) the reading over the indictment to him ; and (3) the asking him whether he is guilty or not.

The prisoner must not be brought up in chains. If brought in chains, the Judge may direct their removal, unless satisfied that they are necessary by reason of his violence. "Every person at the time of his arraignment ought to be used with all the humanity and gentleness which is consistent with the nature of the thing, and under no other terror or uneasiness than what proceeds from a sense of his guilt and the misfortune of his present circumstances, and therefore ought not to be brought to the bar in a contumelious manner."⁸ The calling the party to hold up his hand at the bar is no more but for the special notice that the party is the man required or called for or called on.⁹ It is no essential part of any trial that the prisoner should hold up his hand at the bar ; there is no record of it made when it is done ; the only use is to show the Court who the prisoner is and when that is apparent the Court often proceeds against him though he refuses to hold up his hand at the bar. Therefore, the omission of that ceremony is no legal exception.¹⁰

2. Preliminary objections to proceeding with the Trial.—

It has been held that objections to the jurisdiction of the Court to try the case, as for instance where the Magistrate had no power to commit, should be raised before the plea is taken.¹¹ So an objection, on retrial, to non-prosecution for other offences charged on the first trial ;¹² objection to the joint-trial ; objection to validity of the sanction¹³ and so on. In deciding such objections the following provisions of the Code should be taken into consideration :—

S. 531—No finding, sentence or order (as an order of commitment) of a criminal Court shall be set aside merely on the ground that the inquiry (such as a preliminary inquiry into a case triable by a Court of Session), trial or other proceeding, in the course of which it was arrived at or passed, took place in a wrong Sessions Division, District, Sub-division or other local area, unless it appears that such error has, in fact, occasioned a failure of justice.

S. 532—(1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made, may, after perusal of the proceedings, accept the commitment, if it considers that the accused has not been

7. In re Walsh (1914) 12 G. L. R. 216 (Canada) : E. & E Digest, Vol XIV, P. 248.

8. Hawkins' Pleas of the Crown, 11, C. 28, S. 1.

9. Lilburne's Case (1649) St. Tr. 1270.

10. Stafford's Case (1680) 7 St. Tr. 1217 ; *per* Lord Finch, C.

11. Nabadwip (1868) 1 B.L.R.O.S. Cr. 15, 35, 36.

12. Abdul Hamid (1926) 6 P. 208 : 27 Cr. L. J. 1100 ; A. I. R. 1927 P. 13 : 97 I. C. 364.

13. Madhav (1918) 43 B. 147 : 20 Cr. L. J. 71 : 48 I.C. 871. *See, however*, Nirmal Kanta (1914) 41 C. 1072 : 18 C. W. N. 723 ; 15 Cr. L. J. 460 : 24 I. C. 340.

injured thereby, unless during the inquiry and before the order of commitment, objection was made on behalf either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

S. 215—A commitment once made under S. 213 by a competent Magistrate or by a Civil or Revenue Court under S. 478, can be quashed by the High Court only, and only on a point of law.

As to joinder of charges against the same person, see S. 235, and the joinder of several persons in one trial, see S. 239. Under the Privy Council ruling in *Subrahmanya Ayyar v. Q. E.* 28 I. A. 257 : 25 M. 61 misjoinder of charges or parties in one trial against the express provisions of the law is illegal and cannot be cured by S. 537 Cr. P. C ; nor could such illegal procedure be amended by arranging afterwards what might or might not have been properly submitted to the Jury ; to allow this would be to leave to the Court the functions of the Jury, and the accused would never have really been tried at all upon the charge arranged afterwards by the Court. But a commitment made on a misjoinder of charges or offences which should be tried separately, or in respect of persons contrary to S. 239, does not affect the validity of the proceedings in the 'inquiry', as the judgment of the Privy Council refers only to a trial. A Sessions Judge, therefore, in such a case is competent to hold separate trials and he should do so.¹⁴ He has power under S. 233 to order separate trials for distinct offences.¹⁵ A Sessions Judge has no power to quash a commitment under S. 532, on the ground of illegality of joint trial or want of sanction, the proper procedure being to make a reference under S. 215 to the High Court for quashing the commitment.¹⁶ He has no power to withdraw a case, on the ground that there is an absence of evidence to warrant a commitment, a power especially conferred on the High Court only under S. 215.¹⁷

3. Postponement or Transfer of Trial on the ground of local feeling.—

Where in a murder committed in Newcastle-upon-Tyne which had created great excitement, several journals down to the time of the Assizes had published paragraphs implying or tending to show the guilt of the accused person and it appeared that the jurors at such Assizes were chosen within 15 miles round Newcastle where such papers chiefly circulated, but that at the Summer Assizes they would be taken from the more distant parts of the country (the indictment had been removed from the country of the town of Newcastle, grand jury of which had found it, into the county of Northumberland), Alderson and Parke BB. postponed the trial until the following Assizes, the latter being chiefly moved by the prospect of the

14. In re Govindu (1902) 26 M. 592 ; In re Nalluri (1919) 42 M. 561 : 20 Cr. L. J. 379 : 50 I. C. 987.

15. Upendra (1913) 41 C. 654 : 18 C.W.N. 486 :

19 C. L. J. 53 : 15 Cr. L. J. 73 : 22 I. C. 425.

16. Madhav (1918) 43 B. 147 : 20 Cr. L. J. 71 : 48 I. C. 871.

17. Jogeshwar (1901) 5 C. W. N. 411.

trial being 'before persons living in the midst of this excitement' and saying,—“The publication of the evidence given before the Coroner was in itself highly improper and might have been made the ground of indictment against the publisher”. Alderson B. said,—“I yield to the peculiar circumstances of the case wishing it to be understood that I am by no means disposed to encourage a precedent of this sort.”¹⁸—Roscoe. 1928 Edn. P. 259.

The case of *Dhunno Kazi*¹⁹ was transferred from Hughli to Burdwan as it had been twice tried at Hughli, it being said that such transfer would be more satisfactory to the learned Judge whose summing up was criticised. In *E. v. Nobogopal Bose*²⁰, an application for transfer was made at the instance of the Crown on the ground supported by an affidavit of the District Magistrate that the case was causing considerable excitement in the District, that the prosecutor and one of the accused were persons of influence in the locality; and that most of the inhabitants of the District had their sympathies enlisted on one side or the other. It was held by Garth C. J. that in dealing with such application it should be borne in mind that in the first place there is the right to challenge any of the jurymen who are known to be partisans of either party, if there is any real ground for supposing that they are likely to be unduly biassed; then the Judge may, if he pleases, disregard the verdict of the Jury altogether; and lastly there is the High Court as a last resource in case of any miscarriage of justice. He further observed that there is, therefore, less reason here than there might be in England for transferring a case for trial to another District upon the ground that an impartial Jury is not likely to be obtained. This case, however, was distinguished in a later case. In that case two such officers as the District Magistrate and the Sessions Judge emphatically expressed the belief, that it would be next to impossible to obtain a fair and impartial trial if the case be heard before a Jury chosen from a particular District: it was held that the mere expression of such belief, quite apart from the foundation thereof, must shake the confidence of the parties interested and of the public in the fairness and impartiality of the particular Jury to try the case; that an order for transfer was expedient for the ends of justice under s. 526 cl. (c) of the Cr. P. Code; and that the importance of securing the confidence of the parties in the fairness and impartiality of the tribunal is next only to the importance of securing a fair and impartial tribunal. It was also said, —“The Jury in a case triable by a Jury constitute a part and an important part of the tribunal. It is not quite reasonable to say, where doubt is entertained as to the fairness and impartiality of the Jury, that the trial should nevertheless go before such a Jury, because an erroneous verdict may in the end be set right by the High Court. The case was accordingly transferred from Burdwan to 24 Parganas.”²¹

4. Reading out and explaining the charge to the accused.—

The first step after the accused enters the dock is the reading out in Court the charge and explaining it to the accused (S. 271). The charge relating to previous conviction must not be read out nor the accused be asked to plead thereto, at that stage (See S. 310). A charge may be defined to be a written document containing the description of the

18. Bolam (1839) 2 Moo. C. R. 192. See also Joliffe (1791) 4 T. R. 290.

19. Dhunno Kazi (1981) 8 C. 121 : 10 C. L.R. 151.

20. (1880) 6 C. 491.

21. Bhoirab Chandra (1897) 25 C. 727.

offence, which the Court, either in an inquiry or a trial of a warrant case, finds *prima facie* proved by the evidence before it to have been committed by the accused so as to require him to defend himself.²² The forms in which charges are to be drawn up are detailed in SS. 221-223 of the Code, and Schedule V No. XXVIII prescribes various forms of charges, classifying them under (I) charge with one head, (II) charges with two or more heads and (III) charge for theft after previous conviction. Each charge consists of three parts : the commencement, the statement and the conclusion. The definition of the charge, as given in S. 4 (c), includes any head of charge when it contains more heads than one. The framers of the Code used the term "charge" throughout the Code as the statement of a specific offence and not as indicating the entire series of offences of which a prisoner is accused.²³ One count charging each specific offence and describing it with a reasonable degree of certainty is sufficient.²⁴ The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case (S. 221 (5)). In the Presidency towns the charge shall be written in English ; elsewhere it shall be written either in English or in the language of the Court (S. 221 (6)). No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was, in fact, misled by such error or omission, and it has occasioned a failure of justice (S. 225).

When any person is committed for trial without a charge or with an imperfect or or erroneous charge, the Court or, in the case of a High Court, the Clerk of the Crown, may frame a charge, or add to, or otherwise alter the charge as the case may be (S. 226). The Court may also alter any charge at any time before the verdict of the Jury is returned, or the opinions of the assessors are expressed, every such alteration being read and explained to the accused (S. 227); and may either proceed with the trial (S. 228), or direct a new trial, or adjourn the trial for such period as may be necessary (S. 229). But whenever a charge is altered after the commencement of the trial, the prosecution and the accused shall be allowed to recall or resummon, and examine, with reference to such actual charge, any witness who may have been examined (S. 231).

It should be quite clear from the record of a Sessions trial, what was the charge that was read over to the accused under S. 271. In a trial by a Court of Session the actual charge-sheet, to which the accused is called upon to plead, is a very important document. It should be drawn up and considered with extreme care and caution, so that the accused may have no doubt whatever as to the offences to which he is called upon to answer, and the Judge of the appellate Court may have no doubt also upon the matter. Every addition or alteration made to the charge has to be read over and explained to the accused.²⁵

The provisions of S. 271 *et seq* should be read subject to S. 310, which enacts that the charge relating to previous conviction shall not be read out in Court and the accused shall

22. Prinsep's Cr. P. Code, 15th ed. (1933), P. 338.

23. Appa Subhana (1884) 8 B. 230.

24. Baboolun (1866) 5 W. R. 7.

. Jagdeo Parshad (1920) 18 A. L. J. 442 : 21 Cr. L. J. 410 : 57 I. C. 58.

not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until the Jury have delivered their verdict, or the opinions of the assessors have been recorded on the charge of the subsequent offence.

The charge must be explained to the accused. A plea of guilty on a charge of murder was not accepted because the charge was not properly explained to the accused. When arraigning an accused and before receiving his plea, the Court should be careful to ensure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge to which he is called upon to plead.²⁶ In all the above cases the convictions were set aside and retrials ordered though the accused pleaded guilty to the charge. Especially in cases of trial for life, the charge of murder should be carefully explained.²⁷ It should appear on the face of the proceedings that the charge has been duly read and explained to the accused.²⁸ In this country it is dangerous to assume that a prisoner understands what are the ingredients of the offence under S. 302 I. P. C., and what are the matters which might reduce the act committed to an offence under S. 304 I. P. C.²⁹ Where the facts are complicated, it is the duty of the Judge, even though Counsel may be engaged, to clear the ground and to be quite sure that each accused or his Counsel clearly understands what case he has to meet.³⁰

Omission to read and explain an added charge as required by S. 227 is an error or irregularity which does not prejudice the accused when the prisoner is defended by a competent Counsel who was asked whether he wished for a new trial and declined it,³¹ or where the accused pleaded guilty advisedly.³²

5. Taking accused's Plea.—

After the charge is read out and explained to the accused, he shall be asked whether he is guilty of the offence charged, or claims to be tried (S. 271). SS. 271 and 272 contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature; the plea of 'Not guilty' is one not recognised by the Code of Criminal Procedure, and it is not open to the accused to make any answer to an indictment except 'Guilty' or a claim to be tried; and S. 403 has nothing to do with pleading, but is in terms of a limitation on the jurisdiction of the Court, and a defence under that Section may be set up at any time before verdict in any form.³³ When the accused was not asked what his plea or defence was, and it was not recorded, the conviction is bad.³⁴ The plea should be taken not in the alternative, but separately as to each head of the charge.³⁵ An accused should plead himself and not by Counsel or pleader.³⁶ No pleader

26. Vaimbilee (1880) 5 C. 826; Gopal Dhanuk (1881) 7 C. 96; 8 C. L. R. 471; Aiyavu (1885) 9 M. 61.

27. *In re Sanga* (1886) 2 Weir 339.

28. Gopal Dhanuk (1881) 7 C. 96; 8 C. L. R. 471.

29. Bhadu (1896) 19 A. 119.

30. Jodha Singh (1923) 25 Cr. L. J. 592; A. I. R. 1923 A. 285; 81 I. C. 80.

31. Appa Subhana (1884) 8 B. 200.

32. Nepal (1886) Rat. 229, 236.

33. Nirmal Kanta (1914) 41 C 1072; 18 C.W.N. 723; 15 Cr. L. J. 460; 24 I. C. 340.

34. *Shib Chandra v. Nanda Rani* (1905) 9 C. W. N. lxxvi.

35. Lakshman (1887) Rat. 327.

36. Roopa (1871) 15 W. R. 42.

can be called upon to plead for him 'Guilty' or 'Not guilty,' and it is improper to act on such plea.³⁷ The Court has not, at the time of recording a plea, to determine the truth or falsity of the statements accompanying a plea, but only to take them as explanatory of the plea. The whole and not a part of a prisoner's statements must be taken in order to his conviction.³⁸

6. Plea of Guilty.—

To amount to a plea of guilty there must be a distinct admission of every fact constituting the offence.³⁹ When a plea of guilty is based on a mistake of law, or where a person says that he did certain acts without knowing that they constituted an offence and so really asserted innocence though using the term guilty, this plea should not be accepted as a plea of guilty ; where a plea of guilty should not have been recorded, a retrial should be ordered.⁴⁰ When a long rambling statement is made, more or less admitting guilt, a plea of not guilty ought to be entered.⁴¹ A so-called plea of guilty is sometimes an admission only of the facts alleged, and not of the offence charged, as when such facts in law do not constitute the offence.⁴² An accused person does not plead to a Section of a criminal statute, he pleads guilty or not guilty to the facts alleged to disclose an offence ; the plea of guilty therefore amounts to an admission of the facts alleged against him and is not an admission of guilt.⁴³ In capital cases, where there is any doubt as to whether an accused person fully understands the meaning and effect of a plea of guilty, it is advisable for the Court to take evidence, and not to convict solely on the plea of the accused.⁴⁴ When a Judge refuses a plea of guilty, one of not guilty should be entered.⁴⁵ The Judge must record the plea, and the statements accompanying it should be recorded in the exact words used.⁴⁶ It is not necessary that the statement of the accused made in a foreign language should be taken down in the words of that language ; the language in which it is conveyed to the Court by the interpreter is the language in which it should be recorded.⁴⁷ The Judge should satisfy himself from the oral statement of the accused that his plea of guilty was voluntary ; and for this purpose he may ask the accused questions. The accused may be questioned either under S. 342 or S. 364.⁴⁸ A

37. *Sursing* (1904) 6 Bom. L. R. 861 : 1 Cr. L. J. 939, *per* Batty J. But Aston J. regarded a personal plea as only more regular in form.

38. *Chokoo Khan* (1856) 5 W. R. 70 ; *Boodhoo* (1857) 8 W. R. 38 ; *Jaipal* (1869) 11 W. R. 6 ; *Geloke* (1876) 25 W. R. 15 ; *Sonaoolah* (1876) 25 W. R. 23 ; *Aiyavua* (1885) 9 M. 61 ; *Netai* (1885) 11 C. 410 ; *Wafadar* (1894) 21 C. 955 ; *Sakharam* (1890) 14 B. 564 ; *Harris* (1917) 40 A. 119 : 19 Cr. L. J. 174 : 43 I. C. 590. *Upendra* (1935) 40 C. W. N. 313.

39. *In re Gurrappa* (1884) 2 Weir 336.

40. *Akub Ali* (1919) 31 C. L. J. 122 : 21 Cr. L. J. 547 : 56 I. C. 851 ; *Hem Chandra* (1935) 40 C. W. N. 64.

41. *Deoki* (1908) 5 A. L. J. 157 : 7 Cr. L. J. 295.

42. *Muraji* (1919) 43 B. 842 : 20 Cr. L. J. 684 : 52 I. C. 604.

43. *Bahadur Singh* (1932) 33 Cr. L. J. 646 : A. I. R. (1932) L. 363 : 138 I. C. 400.

44. *Bhadu* (1896) 19 A. 119 ; *Dalli* (1922) 23 A. L. J. 326 : 23 Cr. L. J. 283 : A. I. R. 1922 A. 233 : 66 I. C. 427.

45. *Khudiram* (1908) 9 C. L. J. 55, 72 : 10 Cr. L. J. 325 : 31 C. 625.

46. *Deoki* (1908) 5 A. L. J. 157 : 7 Cr. L. J. 295.

47. *Vaimbilee* (1880) 5 C. 826.

48. *Shyama Charan* (1934) 35 Cr. L. J. 1322 : A. I. R. 1934 P. 330 : 151 I. C. 393 ; *Nga Ywa*. (1934) 12 R. 616 : 36 Cr. L. J. 336 : A. I. R. 1935 R. 49 : 153 I. C. 390 ; *Lakshmana* (1934) 1935 M. W. N. 88.

plea of guilty under S. 271 (2) is not a confession such is dealt with in the Evidence Act in respect of relevancy or irrelevancy. It is a statement which, if accepted by the Court, amounts to a waiver, on the part of the accused, of trial, in which alone a confession might be utilised in evidence.⁴⁹ Where the accused pleads not guilty and jurors are selected and his statement does not amount to a plea of guilty, the trial should proceed in the usual way.⁵⁰ After a prisoner has been given into the charge of the Jury a verdict must be taken.⁵¹

The following cases will illustrate the principles noted above :—

The prisoner was charged under SS. 302 and 304 I. P. C. for killing his wife. He pleaded guilty to the second charge and in course of his statements he confessed that he did not suspect his wife's fidelity ; that he left home on business ; that on his return what he saw convinced him of his wife's infidelity ; and that maddened at the sight, he killed both her and her paramour. The Sessions Judge sentenced him to 10 years' rigorous imprisonment believing (without any evidence) that the prisoner suspected his wife's fidelity from before. *Held*, that the prisoner's statement should be taken in its entirety, that the case is one which ought to be treated with humanity, his act being the result of most grave and sudden provocation, and that a sentence of 1 year's rigorous imprisonment is sufficient.⁵²

The prisoner pleaded guilty to a charge under S. 302 I. P. C. for killing his wife. His plea was accompanied by a statement which, in its general effect, was that although he did strike his wife on the neck with a dao, he never intended to kill her ; that having had a dispute with his wife as to the amount of money expended by him on his son's marriage, he seized a dao, and struck her, but that he did not cut her throat after striking her ; that they were both old people and had been married long, and had always lived on good terms, and it was not likely that he should have intended to kill her. The Sessions Judge accepted it as a plea of guilty and sentenced him to death. *Held* that the Judge was bound to accept the statement of the accused as a whole, if it was taken as a confession at all. The conviction was set aside and a new trial ordered.⁵³

After the accused had pleaded not guilty jurors were selected and owing to the absence of prosecution witnesses the trial was adjourned ; but subsequently the Public Prosecutor did not examine any witness and only one witness who was said to be a very important witness for the defence was examined. The Judge then heard the pleaders and addressed a charge to the Jury which was recorded as follows : "The evidence against the accused was so overwhelmingly strong that I had no hesitation in accepting his full statement of the facts given by the accused in this Court * * Though the evidence does not justify any reduction of the offence from murder to culpable homicide, still the Court would be inclined to be lenient to a man who is so wretched a cripple as we see the accused to be. It is impossible to say what real troubles he may have had to put up with." *Held* that the accused's statement did not amount to a plea of guilty, and therefore the accused

49. Shyama Charan (1934) 35 Cr. L. J. 1322 : A. I. R. 1934 P. 330 : 151 I. C. 393.

50. Mahmad Ismail (1904) 6 Bom. L. R. 671 : 1 Cr. L. J. 772.

51. Hancock (1931) 23 Cr. A. R. 16.

52. Boodhoo (1867) 8 W. R. 38. *See also* Dhira (1877) Rat. 122 ; Lakshman (1891) Rat. 532.

53. Sonaoollah (1876) 25 W. R. 23.

was not convicted on his own plea nor legally tried on the evidence ; that the trial should proceed in the usual way ; and that the verdict of the Jury ought to be taken upon the evidence and not upon the Judge's view of the strength of the evidence.⁵⁴

The prisoner having admitted before the Court of Sessions that he had killed his wife, no assessors were empanelled. At the end, however, of his confession, he pleaded that he was not in his right mind at the time. The Sessions Judge convicted him of murder. *Held*, that the accused has not been tried according to law ; that the prisoner admitted that he had killed his wife, but pleaded that he was not in his right mind at the time ; that the plea was in effect one of not guilty ; that the proceeding should be quashed and a new trial ordered.⁵⁵

The prisoner pleaded guilty to a charge under S. 211 I. P. C. but went on to say that he did not commit the offence with which he was charged. *Held*, that the plea was really one of not guilty.⁵⁶

When the accused admitted throughout that he beat his wife and that she died, but it appeared open to question whether he admitted the existence of any connection between the beating and the death, or of any intention to cause such bodily injury as was likely to cause death, it was held that the conviction on the plea of guilty of culpable homicide not amounting to murder could not be sustained.⁵⁷

Where there is a clear *prima facie* case of murder, a Sessions Judge cannot legally, without trying the case, accept a statement made by the accused, who is charged with the offence of murder, as sufficient to establish his plea of guilty of the offence of culpable homicide not amounting to murder on the ground of grave and provocation, and convict and sentence him accordingly for such offence on his own plea.⁵⁸

Where the prisoner admitted killing another in a struggle on the latter having first attacked him : *Held*, that it did not amount to pleading to the charge of murder.⁵⁹

The prisoner pleaded guilty to the charge of murder because of being subject to epileptic fits. *Held*, that it was not a plea of guilty on which a conviction can be based.⁶⁰

The prisoner was charged under S. 302 I. P. C. for killing his wife. His plea was recorded as follows :—"Guilty. I killed my wife. She had abused me, called me '*Ware*'. No one was present. I killed her with *Kulhari*". The Sessions Judge convicted him on this plea without taking any evidence. *Held*, that it was not an unqualified plea of guilty ; and although the words of abuse which the prisoner said had been used might not have the effect of taking the case out of S. 302 I. P. C, they put a qualification on his admission, and made it necessary that the trial should proceed and evidence should be taken.⁶¹

The prisoner pleaded guilty to a charge of murdering a woman, alleging at the same

54. Mahmad Ismail (1904) 6 Bom. L. R. 671
Cr. L. J. 772.

55. Cheit Ram (1873) 5 N. W. P. 110.

56. Mitrun (1869) 11 W. R. 53.

57. *In re Gurrappa* (1884) 2 Weir 336.

58. *Malhari* (1888) Rat. 410.

59. *Vaimbilee* (1830) 5. C. 826.

60. *Mhatarya* (1894) Rat. 698.

61. *Bhadu* (1896) 19 A. 119.

time that he killed her out of jealousy. *Held*, that it did not amount to a plea of guilty on a charge of murder, and a retrial was ordered.⁶²

On a charge under S. 211 I. P. C, the prisoner pleaded that he made a false complaint unthinkingly. *Held*, that it was not a plea of guilty.⁶³

7. Conviction on a Plea of Guilty—

Sub.-S(2) of S. 271 says that the accused may be convicted on his plea of guilty. It is discretionary with the Judge to accept the plea of guilty or not.⁶⁴ (Cf. S. 255(2) Cr. P. C.). The Court may proceed to take evidence under S. 286. It will be well to hesitate before convicting a man on his bare admission of guilt. So many secret motives may be at work to lead a man wrongly to plead guilty : and so much misconception prevails amongst the classes to which criminals ordinarily belong, that the more just and humane course, at least in all grave cases, will be to advise the prisoner to recall his plea, or failing that proceed with the trial. And more especially should this course be adopted when the offence charged is murder. Killing a man is generally believed by ignorant men to be tantamount to murder, and a man may unhesitatingly admit that he is a murderer, meaning only that he killed the deceased.⁶⁵ In a case of murder it has long been the practice of the High Courts not to accept the plea of guilty ; murder is a mixed question of law and fact, and unless the Court is perfectly satisfied that the accused knew exactly what was necessarily implied by his plea of guilty, the case should be tried.⁶⁶ (*See Notes under the previous heading*). Where the plea is properly recorded there may be a conviction for murder.⁶⁷ A plea of guilty should not be accepted when the co-accused's defence, if proved, may involve his own innocence.⁶⁸ The Court may in certain cases accept the plea of guilty and continue the trial against others, without convicting the accused who pleaded guilty, when it is necessary for the purpose of sentence to know the part he had taken or to determine the amount of his guilt.⁶⁹ But in such a case the Judge should convict at once whether or not the sentence is deferred. Thus, where some of the accused pleaded guilty to a charge of dacoity brought against them and other persons jointly tried with them, and the Judge did not record their conviction but went on with the trial till the end, it was held that the Judge had committed an irregularity in as much as he should have recorded

62. Lahori (1925) 23 A. L. J. 587 : 26 Cr. L. J. 1316 : A. I. R. 1925 A. 647 : 89 I. C. 260.

63. Gopal Dhanuk (1881) 7 C. 96 : 8 C. L. R. 471.

64. Surjan Singh (1914) 12 A. L. J. 1239 : 16 Cr. L. J. 103 : 27 I. C. 151 ; Shyama Charan (1934) 35 Cr. L. J. 1322 : A. I. R. 1934 P. 330 : 151 I. C. 393 ; Mahammad Yusuf (1931) 58 C. 1214 : 35 C. W. N. 490 : 32 Cr. L. J. 667 : A. I. R. 1931 C. 341 : 131 I. C. 142 ; Shanker (1925) 24 A. L. J. 318 : 27 Cr. L. J. 449 : A. I. R. 1926 A 318 : 93 I. C. 241.

65. Nelson's Cr. P. Code, 1872, P. 235.

66. Dalli (1922) 20 A. L. J. 326 : 23 Cr. L. J. 283 ; A. I. R. 1922 A. 233 : 66 I. C. 427 ; Bhadu (1896) 19 A. 119 ; Chinna (1899) 23 M. 151 ;

Achar Sanghar (1934) 28 S. L. R. 327 : 36 Cr. L. J. 324 : A. I. R. 1934 S. 204 : 153 I. C. 288 ; Laxmya Shiddapa (1917) 19 Bom. L. R. 356 : 18 Cr. L. J. 699 : 40 I. C. 699 ; Hasaruddin (1928) 30 Cr. L. J. 508 : A. I. R. 1928 C. 775 : 115 I. C. 582.

Manjoo (1922) 24 Cr. L. J. 570 : A. I. R. 1923 N. 251 : 73 I. C. 266.

68. Sukdev (1909) 13 C. W. N. 552 : 9 C. L. J. 291 : 10 Cr. L. J. 484 : 4 I. C. 57.

69. Paltua (1900) 23 A. 53 ; Shanker (1925) 24 A. L. J. 318 : 27 Cr. L. J. 449 : A. I. R. 1926 A. 318 : 93 I. C. 241 ; Kalu (1874) 11 Bom. H. C. R. 146.

the conviction of the confessing accused and then gone on with the trial of the others.⁷⁰ If the Judge does not think fit to convict the prisoner on the charge to which he has pleaded guilty he should proceed to try him, and thereupon he will have to take all the evidence in order to determine whether the prisoner has committed the offence to which he has pleaded guilty or any other offence with which he is charged.⁷¹ When such a procedure is adopted, the trial does not terminate with the plea of guilty. It does not strictly end until the accused has been either convicted or acquitted or discharged.⁷² But where the Court is prepared to convict on the plea, it is improper to defer conviction merely to take into consideration his confession against the co-accused under S. 30 of the Evidence Act.⁷³ Where a co-accused pleaded guilty and his plea was accepted by the Court, a confession made by him is one made by a person who was not tried along with the other co-accused and cannot be taken into consideration against them under S. 30 of the Evidence Act.⁷⁴ Keeping a prisoner in the dock after accepting his plea of guilty and deferring his conviction and sentence, merely to see what sentence to be passed after hearing all the evidence against the co-accused, does not amount to his being "jointly tried" with the other accused so as to entitle the Court to consider his statement against the other accused under S. 30 of the Evidence Act; but where the confessing prisoner was kept in the dock (his plea as such not being accepted), to give him an opportunity to cross-examine the witnesses, and the opinion of the assessors was also taken about his guilt, his statement can be taken into consideration under S. 30 of the Evidence Act.⁷⁵ As to the competence of a confessing prisoner, as a witness, when he was convicted but his sentence was deferred, Candy J. held that he was so competent as his trial was at an end as soon as he was convicted, but Fulton J. held that the trial did not end until he was sentenced as well.⁷⁶ Where a person has pleaded guilty and his plea has been accepted, he *ipso facto* ceases to be an accused person; still more is it that he ceases to be an accused person when he has been convicted.⁷⁷ It is always desirable to pass a sentence completely before calling an accused to give evidence against his co-accused, so that he may give his evidence with a mind free of corrupt influences, which the fear of impending punishment and the desire to obtain immunity to himself at the expense of the co-prisoner might otherwise produce. But this course is not essential.⁷⁸ There is no difference between the expression "found guilty" and "convicted".⁷⁹

70. Surjan Singh (1914) 12 A. L. J. 1239 : 16 Cr. L. J. 103 : 27 I. C. 151.

71. Gobardhan (1870) 4 B. L. R. App. 101.

72. Chinna (1899) 23 M. 151 ; Paltua (1900) 23 A. 53 ; Sukdev (1909) 13 C. W. N. 552 : 9 C. L. J. 291 : 10 Cr. L. J. 484 : 4 I. C. 57 ; Annya (1901) 3 Bom. L. R. 437.

73. Kheoraj (1908) 30 A. 540 : 8 Cr. L. J. 380. See also Paltua (1900) 23 A. 53 ; Chinna (1899) 23 M. 151.

74. Kanhaya (1911) 15 P. R. 1911 Cr. : 12 Cr. L. J. 605 : 12 I. C. 981 ; Keramat (1911) 38 C.

446 : 16 C. W. N. 49 : 12 Cr. L. J. 479 : 12 I. C. 87.

75. Pahuji (1894) 19 B. 195.

76. Annya (1901) 3 Bom. L. R. 437.

77. Mahammad Yusuf (1931) 58 C. 1214 : 35 C. W. N. 490 : 32 Cr. L. J. 667 : A. I. R. 1931 C. 341 : 131 I. C. 142 [relying on Khudiram (1908) 9 C. L. J. 55 : 10 Cr. L. J. 325 : 3 I. C. 625]

78. Ibid.

79. Lakshman (1933) 58 B. 37 (F. B.) : A. I. R. 1933 B. 461 : 146 I. C. 1.

An accused person cannot be convicted of another offence not charged when he has pleaded guilty to the charge on trial. Thus, where a Sessions Judge convicted the prisoner of grievous hurt when he pleaded guilty to the charge of culpable homicide not amounting to murder, having regard to the evidence before the committing Magistrate it was held that the Sessions Judge should have tried the case. It is illegal to convict the accused of an offence of which he does not plead guilty and for which he has not been tried.⁸⁰ If there are circumstances given in evidence before the committing Magistrate which apparently reduce the offence, the Sessions Judge, in the exercise of his discretion, should hold the trial and take the verdict of the Jury.⁸¹ In a clear *prima facie* case of murder, it is illegal to accept a plea of guilty under S. 304 I. P. C on the allegation of grave and sudden provocation and convict thereunder.⁸²

The word "thereon" in S. 271(2) means that the conviction may be "upon the plea recorded before the Sessions Judge", and has no reference to what has passed before the Magistrate in the preliminary enquiry.⁸³ If the Judge accepts the plea, he is bound to convict. Judicial tribunals are not entrusted with the prerogative of mercy; they should administer the law not as they wish it might be, but as they find it.⁸⁴ In *Mohomed Yusuf v. E.* (1931) 58C. 1214 : 35C. W. N. 490 : Cr. L. J. 657 : A. I. R. 1931 C 341 : 131 I. C. 142. the Calcutta High Court (Lort-Williams & Ghose JJ.) observed :—"If the plea is not accepted there seems to be no sense in recording it. The trial, however, does not proceed because S. 272 does not apply, where the accused pleads guilty. S. 271 means that where the accused pleads guilty the Court need not necessarily record a conviction against him; his plea should be recorded and in a suitable case the Court may leave the matter there and discharge him. He cannot then be tried." This view has been dissented from in *Public Prosecutor v. Lakshmanan*⁸⁵, where the Madras High Court (Curgenven & Cornish JJ.) has held that the Court has got a discretion, when it does not feel justified in accepting a plea of guilty, of directing that an accused should be tried; one course open to the Court is to put questions to the accused to ascertain whether the plea ought to be accepted or not; another course is to examine the record of the case and in that way to reach its conclusion on that point. The fact that the accused person utters a lie is not sufficient to convict him by itself.⁸⁶

S. 271 (2) is concerned with a plea of guilty before the commencement of the trial. A confessional statement made at the close of a trial is not a plea of guilty upon which the Judge can record a finding without taking the verdict of the Jury. After a prisoner has once claimed to be tried, all the evidence including the prisoner's admission must be laid before them.⁸⁷

80. Raghu (1888) Rat. 413.

81. 2 Weir 335 ; Gobadur (1870) 13 W. R. 55.

82. Malhari (1888) Rat. 410.

83. Hursookh (1870) 2 N. W. P. 479.

84. Sohrai (1929) 9 P. 474 : 31 Cr. L. J. 721 : A. I. R. 1930 P. 247 : 124 I. C. 836.

85. 1935 M. W. N. 88.

86. Bacha Babu (1934) 36 Cr. L. J. 684 : A. I. R. 1935 A. 162 : 155 I. C. 369. See also 2 Weir 335.

87. 2 Weir 334.

8. When the accused does not plead or refuses to plead or claims to be tried.—Pleas. (S. 272).—

Where the accused pleads guilty to the charge and the Judge accepts the plea, he may be convicted thereon, and so far he is concerned, the proceedings come to an end. But when he makes no answer to the enquiry whether he is guilty or claims to be tried (S. 271), it should be ascertained whether he is obstinately mute, or dumb or *Ex Visitatione Dei*. If he be found to be obstinately mute, the plea of not guilty should be recorded, and the trial should proceed. If he found to be dumb *Ex Visitatione Dei*, an enquiry should be made as to whether he is sane or insane or incapable of being tried. If found sane, a plea of not guilty should be recorded, and the trial should proceed; but if found to be insane, the procedure laid down in chapter XXXIV should be followed (See S. 465).⁸⁸ The issue to be tried in such a case is the state of the prisoner's mind at the date of the arraignment and not at any prior time⁸⁹; and the Jury may form their own opinion about it from his demeanour, though under ordinary circumstances it is usual to require some evidence to be given.⁹⁰ Even under Act X of 1872, S. 425, it was held that when an accused person at his trial appears to the Sessions Judge (the word 'Court' was used in the Section) to be of unsound mind, the trial of the issue of insanity was a part of the trial of the accused and ought to be tried by the Jury and not by the Sessions Judge personally.⁹¹ And it was also ruled that this issue was to be first submitted to the Jury.⁹² It was also said:—"It is obvious that the two issues of insanity** are not the same. For it might well happen that the prisoner was of unsound mind and incapable of properly conducting his defence at the time of the trial, and yet of sound mind, responsible before the law for his actions, at the time when the deed was committed which was charged against him. And further ** it is obvious that it is necessary to keep these two issues perfectly distinct in a criminal trial because the questions it should be proper to put to expert witnesses would be different upon the trial of these two issues respectively"⁹³. Under S. 465 of the Code it is for the prosecution to establish that a person who is alleged to be of unsound mind is capable of standing his trial and not for the defence to establish the contrary⁹⁴. If the accused refuses to plead or claims to be tried, the Court must proceed to try the case and for that purpose proceed first to choose jurors or assessors as the case may be. Even when the accused refuses to plead and shows himself ready to go to jail, it is nevertheless the duty of the Court to sift the evidence for the prosecution and to refuse to convict the accused if the evidence is insufficient, not only because this proceeding is required by law but also because the Court has a duty to protect the tax-payers from unjustified expenditure⁹⁵.

As has been noticed before (see Notes under heading "Taking accused's Plea") the

88. Sattya (1869) Rat. 19. For the English Practice See Archbold's Criminal Pleading, Evidence and Practice (1927), P. 171.

89. Keary (1878) 14 Cox 143.

90. Goode (1837) 7 A & E 536; Davies (1853) 6 Cox 326, Turton, 6 Cox 385.

91. Bheeko Kalwar (1873) 19 W. R. 15: 10 B. L. R. App. 10.

92. Doorjodhun (1873) 19 W. R. 26.

93. Ibid.

94. Shib Das Kundu (1924) 51 C. 584: 25 Cr. L. J. 1051: 1924 A. I. R. C. 713: 81 I. C. 827.

95. Basu (1932) 1933 A. L. J. 1197: 34 Cr. L. J. 1062: A. I. R. 1933 A 614: 145 I. C. 738.

Criminal Procedure Code does not expressly recognize a plea of "Not guilty". When, therefore, an accused raises such pleas as (1) *Autre fois acquit* or (2) *Autre fois convict* or (3) Pardon, it should be taken that the accused claims to be tried i. e., tried by Jury or with the aid of assessors. The aforesaid pleas assume that he may have committed the offence charged, but as he had already been tried on the charge and was either acquitted or convicted or pardoned, so he cannot now be tried again. Such pleas are, therefore, in the nature of a defence and the accused must have to prove them in the course of the trial, which amounts to this that 'he claims to be tried'. Such pleas may be raised at any time before verdict and in any form⁹⁶. These as called special pleas and must be proved by the prisoner. As to the pleas Nos. (1) and (2), see S. 403. As to plea No. (3), see S. 339A. The Court trying a person who has accepted a tender of pardon shall ask him whether he pleads that he has complied with the conditions on which the tender of pardon was made; and if he does so plead then the Court shall record the plea and proceed with the trial and the Jury or the Court with the aid of assessors shall before judgment is passed in the case find whether the accused has complied with the conditions of the pardon and if it is so found the Court shall pass judgment of acquittal. Failure of the Court to comply with these provisions vitiates a trial⁹⁷. Although pardon had been tendered to and accepted by an accused in the Committing Magistrate's Court, his name was removed from the category of the pardoned accused through some mistake, and on the opening of the trial in the Sessions Court his plea was taken by the Sessions Judge. But the mistake was soon found out and the Sessions Judge directed that he should be removed from the dock. *Held*, that the evidence given by the accused in the Sessions Court was not inadmissible⁹⁸. When no such pleas are taken and the prisoner claims to be tried, it amounts to this that he pleads "Not guilty", which is a general issue and must be disproved by the prosecution at the trial. If in the course of the trial, the accused pleads guilty or confesses, the Sessions Judge cannot convict him on such confession without taking the verdict of the Jury or the opinions of the assessors; and for that purpose all the evidence, including the confession, must be laid before the Jury or the assessors⁹⁹.

There is another class of cases, in which the accused, while pleading guilty to a charge, qualifies it by stating that when he committed the act he was of unsound mind and did not know the nature of the act, or that he committed it under grave and sudden provocation, or that he committed it in self-defence, and so forth. In other words, while admitting that he did the act he at the same time pleads circumstances which exonerate him wholly or partially from the consequences of the offence with which he is charged. And this virtually amounts to pleading "Not guilty" to the charge, or claiming to be tried; for under S. 105 of the

96. Nirmal Kanta (1914) 41 C 1072 : 18 C. W. N 723 : 15 Cr. L. J. 460 : 24 I. C. 340.

97. Ali (1924) 5 L 379 : 26 Cr. L. J. 237 : A. I. R. 1925 L 15 : 84 I. C. 61 ; Itwari (1928) 6 O. W. N. 372 : 30 Cr. L. J. 559 : A. I. R. 1929 Q. 256 : 116 I. C. 64.

98. Haji Ayub Mondal (1927) 54 C. 539 : 28 Cr. L. J. 689 : A. I. R. 1927 C. 680 : 103 I. C. 545.

99. 2 Weir 335.

Evidence Act, "When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any Special Exception or Proviso contained in any other part of the same Code, or in any Law defining the offence, is upon him and the Court shall presume the absence of such circumstances". The general rule in all criminal proceedings is that the onus of proving everything essential to the establishment of a charge against an accused lies on the prosecution ; in other words, law always presumes innocence in the absence of convincing testimony to the contrary. But S. 105 of the Evidence Act quoted above enacts an important exception to this general rule. When an accused sets up a general or special exception in his defence and pleads that the acts committed by him do not really constitute an offence, because of the saving of these exceptions, it lies upon him to prove that circumstances are such that his case falls under those exceptions. These "General" Exceptions are mentioned in Chapter IV of the Penal Code and are applicable to all crimes. "Special" exceptions are exceptions mentioned under particular crimes under particular Sections ; for instance, the five exceptions in S. 300 I. P. C. when culpable homicide is not murder, the ten exceptions to defamation mentioned under S. 499 I. P. C, the plea of grave and sudden provocation under S. 335 I. P. C. which modifies a charge under S. 325 I. P. C., and so forth. That Section of the Evidence Act requires the Court to regard the absence of the circumstances which constitute a general or special exception as proved unless and until it is disproved by the accused.¹⁰⁰ The Court has not, at the time of recording a plea, to determine the truth or falsity of the statements accompanying a plea, but only to take them as explanatory to the plea.¹⁰¹ See the illustrations given under heading "Plea of guilty", *ante*. It should be noted, however, that the accused is not bound to plead such an exception at the outset, that is to say, when asked to answer whether he pleads guilty or claims to be tried. He can raise it at any time in the course of the trial. And even if he does not raise it, the trial Court is not precluded from considering it, if it appears on the prosecution or the defence evidence.¹⁰² There are no pleadings in criminal cases, and the accused is not judged by what he pleads or fails to plead : he is not bound to plead an exception.¹⁰³

9. When Jurors or Assessors are to be chosen (S. 272).—

When the accused refuses to, or does not, plead, or claims to be tried the Court shall proceed to choose jurors or assessors and to try the case. After the plea the trial must proceed, and the commitment cannot be quashed as based on depositions recorded under S. 512, Cr. P. C. but the Judge may adjourn and summon the witnesses under S. 540 Cr.

100. Upendra (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; Wauchope (1933) 61 C. 168 : 38 C. W. N. 187 : 58 C. L. J. 405 : 35 Cr. L. J. 156 : A. I. R. 1933 C. 80 : 146 I. C. 767.

101. Lakshman (1887) Rat. 327.

102. Upendra (1914) 19 C. W. N. 653 (F. B.) : 21

C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; Pasput (1897) 1 C. W. N. 545, 547.

103. Umed Singh (1923) 46 A. 64 : 25 Cr. L. J. 327 : A. I. R. 1924 A. 299 : 77 I. C. 183 ; Jeremiah v. Vas (1911) 36 M. 457 : 12 Cr. L. J. 585 : 12 I. C. 961 ; Adam Ali (1926) 31 C. W. N. 314 : 45 C. L. J. 139 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718.

P. C. ¹⁰⁴ He cannot stop a trial once commenced in order to refer to the High Court a question of law, but must decide it himself.¹⁰⁵ Where, however, the offences are compoundable under S. 345 Cr. P. Code with the permission of the Court, the Sessions Judge may allow such composition and stop the trial and the effect of such composition shall be the acquittal of that accused (S. 345 (6)).

10. Trial by same Jury or Assessors of several cases in succession. Cross-cases. (Proviso to S. 272).—

As to the choosing of jurors or assessors, see the next Chapter. It is not necessary in every case to choose new jurors or assessors, but the same jurors chosen in a previous case in that Sessions may continue to try, or the same assessors so chosen may aid in the trial of, as many accused persons, sent up for trial to that Sessions, successively, as the Court thinks fit, subject however to the objection in each case as to the personale of the jurors or assessors. If such objection is taken and allowed, fresh jurors or assessors have to be chosen for the trial of that case (Proviso to S. 272). The proviso means that on the conclusion of one trial, the same Jury may proceed to try the accused in the next case. The law does not contemplate that two trials shall be conducted piece-meal in such a manner that at their conclusion the Jury shall be called upon to decide at one and the same time upon two distinct classes of evidence which, though they have points in common (as in cross-cases), require careful discrimination as bearing upon the guilt or innocence of two sets of accused.¹⁰⁶ Where there are two cross-cases, if there is no objection by the parties to the Jury, the second case may be tried by the same Jury after the termination of the first case. There is, however, no provision in the Code permitting both cases to be tried by the same Jury at the same time.¹⁰⁷ It is not an absolute rule that all charges and counter-charges should be tried by the same Court.¹⁰⁸ There can be nothing irregular in a Judge trying a case or a counter-case to a conclusion before different assessors and afterwards pronouncing judgment in both, so long as he tries the one quite independently of the facts in the other. Should the Judge, however, feel that he is likely to be embarrassed by the adoption of this procedure, he will no doubt get a transfer of the counter-case to the file of another Sessions Judge. What must be made clear is : (1) that the trials must be separate, i. e., before different assessors and separate judgments delivered ; (2) that the conclusion in each case must be founded on, and only on, the evidence in each case ; and (3) that if the Judge considers himself unable to detach himself from extraneous considerations, a transfer may be

104. Sagambur (1882) 12 C. L. R. 120. See also Hancock (1931) 23 Cr. A. R. 16.

105. Bapuji (1885) Rat. 214.

106. Hossein Buksh (1880) 6 C. 96 ; Mathuswami v. Rangunath 1933 M. W. N. 1274 [relying on *In re Mounagurusami* (1932) 56 M. 159 (F. B.) : 34 Cr. L. J. 175 : A. I. R. 1933 M 367 : 141 I. C. 539]

107. Rajatullya V. Khudia (1931) 54 C. L. J. 146 : 32 Cr. L. J. 1233 : A. I. R. 1931 C. 709 : 134 I. C. 896 ; Jaggu 1932 M. W. N. 692.

108. Lakshminarayana v. Suryanarayana (1932) 63 M. L. J. 101 : 33 Cr. L. J. 765 : A. I. R. 1932 N. 502 : 139 I. C. 343.

necessary to deliver the Judge from this embarrassment.¹⁰⁹ Where there were three cases of perjury commenced separately, it was held that the same Jury may try all of them.¹¹⁰ It cannot be laid down as a general rule that a Jury which has acquitted the accused in one indictment should not try him on another ; it must depend on the circumstances of each case ; when it occurs they must be warned that the evidence in the two cases is not cumulative.¹¹¹

11. Staying proceedings upon a charge or portion of a charge. (S. 273).—

Only the High Court can, at any time before the commencement of the trial, make on a charge an entry to the effect that the charge or any portion of it is clearly unsustainable. The entry has the effect of staying proceedings on that charge or portion of it, but has not the effect of an acquittal for the purpose of S. 403 Cr. P. C. Applications under S. 273 to the High Court should be disposed of by it in the exercise of its ordinary original criminal jurisdiction.¹¹² As an instance, where the High Court made such an entry, see the case cited below,¹¹³ where the accused were committed for trial to the High Court on a charge under S. 372 I. P. C. by the Presidency Magistrate, and Pigot J. on a petition of the accused, after perusing the charges and finding that the facts found did not, in law, constitute an offence under that Section made an entry on the charge under S. 273 Cr. P. C.

The Section has no reference to cases of illegal commitment. It is intended to provide a short and effective way by which charges which have no merits may be disposed of.¹¹⁴

109. *In re Mounagurusami* (1932) 56 M. 159 (F. B.) : 34 Cr. L. J. 175 : A. I. R. 1933 M. 367 : 141 I. C. 539 [distinguishing *Goriparthi* (1929) M. W. N. 881 ; *Krishna* (1929) M. W. N. 883 : 31 Cr. L. J. 451 : A. I. R. 1930 M. 193 : 123 I. C. 10 ; and *Kandregula* (1932) M. W. N. 692]
110. *Rafiuzzaman v. Chhotey* (1925) 48 A. 325 : 57

Cr. L. J. 445 : A. I. R. 1926 A. 334 : 93 I. C. 237.

111. *Klein* (1926) 19 Cr. A. R. 161.

112. *Charoo Chunder* (1882) 9 C. 397.

113. *Sukee Raur* (1893) 21 C. 97.

114. *Girish* (1929) 57 C. 1042 (F. B.) : 34 C. W. N. 13 : 50 C. L. J. 408 : 31 Cr. L. J. 506 : A. I. R. 1929 C. 756 : 123 I. C. 433.

CHAPTER III.

C—Choosing a jury—SS. 274-283.

S. 274. (1) In trials before the High Court the jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than five or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct :

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons and, if practicable, of nine persons.

S. 275. (1) In a trial by jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British subject, of persons who are Europeans or Americans, and in the case of an Indian British subject, of Indians.

(2) In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.

S. 276. The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High Court may from time to time by rule direct :

Provided that—

First, pending the issue under this section of rules for any Court the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

Secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ;

Thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court—

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs,
the juror shall be chosen from the special jury list hereinafter prescribed ; and

Fourthly, in any district in which the Local Government has declared that the trial of certain offences shall be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

S. 277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated :

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown and eight on behalf of the person or all the persons charged.

S. 278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

(a) some presumed or actual partiality in the juror ;

(b) some personal grounds, such as alienage, deficiency in the qualification required by any

law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years ;

- (e) his having by habit or religious vows relinquished all care of worldly affairs ;
- (d) his holding any office in or under the Court ;
- (e) his executing any duties of police or being entrusted with police-duties ;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

S. 279. (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Provided that no objection to such juror or other person is taken under section 278 and allowed.

S. 280. (1) When the jurors have been chosen, they shall appoint one of their number to be foreman.

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury, and ask any information from the Court that is required by the jury or any of the jurors.

(3) If the majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

S. 281. When the foreman has been appointed, the jurors shall be sworn under the Indian Oaths Act, 1873.

S. 282. (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not possible to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

(2) In each of such cases the trial shall commence anew.

S. 283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

List of Headings :—

1. Number of jurors.
2. Composition of jury according to the nationality of the accused (S. 275)
3. Method of choosing jurors.
4. Objection against jurors—Grounds of, (Ss. 277-278).
5. Offences concerning jurors.
6. Indemnity of jurors.
7. Foreman of the jury.
8. Swearing of the jurors.
9. When a new juror shall be added, or the jury discharged and a new jury chosen, before the return of the verdict.
10. Judge's discretion in discharging a jury and choosing a new jury, under the English Law.

COMMENTARY.

1. Number of Jurors—The number of jurors required to form a Jury for the trial of any case in the High Court is nine. In a Court of Session, the number shall be uneven but not exceed nine, and the minimum may be five in cases of trials for offences not punishable with death; for the trial of an offence punishable with death, the number shall not be less than seven, and if possible nine (S. 274). The Local Government, while directing what offences or what particular class of offences in any district shall be tried by Jury under S. 269, may at the same time direct what shall be the number of jurors,—5, 7 or 9—to form a Jury in that district. Previously the minimum number was three, and the present change has been effected by S. 13 of Act XII of 1923.

A trial held by a greater number of jurors than fixed by the Local Government, was declared to be illegal, as the Court was not properly constituted and the error was not curable by S. 537.¹

The preparation of a list of jurors (including special jurors) for the High Court and the mode of summoning them have been provided for by Ss. 312-318 Cr. P. C.

The preparation of a list of jurors (including special jurors) and assessors for the Court of Session and the mode of summoning them have been provided for by Ss. 319-332 of the Code.

Where an unreasonably small number of jurors was summoned with the result that it was not possible to have a jury of nine, *held*, that the proceedings were illegal and liable to be set aside.² The law requires that the number of jurors to be summoned should not be less than double the number required for the trial. In case of an offence punishable with death, the Jury shall consist of not less than seven persons, and if practicable of nine persons. Where in a murder case, instead of 18 only 14 jurors were summoned and from out of 11 present, instead of 9 only 7 were empanelled, the trial was held to be illegal.³ Where out of the number summoned for the trial of a murder case, only 7 jurors were present and all of them were empanelled and it was not shown that the Judge applied his mind to the question as to whether it was practicable to have 9 jurors; *held*, that it was the duty of the Judge to have applied his mind to the question of empanelling the Jury, that the onus was not on the accused to show that the Court did not consider the practicability of having 9 jurors, and that the trial was vitiated on that account.⁴ But it has been held that unless there is an indication on the face of the record itself or there are other materials before the Court, which lead to the conclusion that it was or might have been practicable to have the Jury composed of nine jurors rather than seven, one must assume that it was not practicable to have nine jurors.⁵

1. Booth (1903) 26 A. 211 : 1 Cr. L. J. 43.

2. Serajul Islam (1927) 55 C. 794 : 29 Cr. L. J. 927 : A. I. R. 1928 C. 645 : 111 I. C. 735.

3. Dwarika (1929) 56 C. 1154 : 33 C. W. N. 692 : 31 Cr. L. J. 377 : A. I. R. 1930 C. 60 : 122 I. C. 219.

4. Shaheb Ali (1931) 58 C. 1272 : 35 C. W. N.

711 : 54 C. L. J. 307 : 33 Cr. L. J. 129 : A. I. R. 1931 C. 793 : 135 I. C. 435

5. Benat Pramanik (1935) 62 C. 900 : 39 C. W. N. 954 : 36 Cr. L. J. 944 : A. I. R. 1935 C. 407 : 156 I. C. 481 [following Damullya (1930) 34 C. W. N. 127 : 32 Cr. L. J. 187 : A. I. R. 1931 C. 261 : 128 I. C. 808]

Objection to the constitution of the Jury, when not raised at the time of the trial, cannot be raised in an appeal against the acquittal,⁶ or at a late stage of the trial.⁷ Where the trial of one of the accused is vitiated on account of the non-compliance of S. 274, the conviction of the other persons who were tried jointly with him should also be set aside.⁸

2. Composition of Jury according to the nationality of the accused (S. 275).

Special provision has been made for choosing a Jury, the majority of which will be of the same nationality as the accused. S. 275 which contains this provision has been substituted for the old Section by S. 14 of the Criminal Law Amendment Act XII of 1923, commonly known as the Racial Discrimination Removal Act. The old Section was in the following terms :-

“In a trial by Jury before the Court of Session of a person not being an European or an American, a majority of the Jury shall, if he so desires, consist of persons who are neither Europeans nor Americans”.

Act XII of 1923, as is set out in its preamble, was enacted “in order to provide for the removal of certain existing discriminations between European British subjects and Indians in criminal trials and proceedings. It substituted for the old Ch. XXXIII which was headed “General Proceedings against Europeans and Americans” containing 21 Sections (Ss. 443-463) the present Chapter XXXIII headed “Special Provisions relating to cases in which European and Indian British subjects are concerned” and consisting of 7 Sections only (Ss. 443-449). It also inserted into the Code a new Chapter XLIV—A, headed “Supplementary Provisions relating to European and Indian British subjects and others”, and containing Ss. 528A-528D. The effect of these and other amendments made by the same Act has been that (1) certain privileges which Europeans enjoyed in the matter of their trial have been abolished, and (2) other privileges have been modified and have been conferred on Indians likewise. The present Ch. XXXIII deals with that particular class of cases in which an European British subject on the one side and an Indian British subject on the other are concerned and which may therefore tend to have a racial complexion. In such a case outside the Presidency towns, the accused, (in a case between an Indian and an European) the European British subject, or (in a case between an European and Indian) the Indian British subject, may claim that the case be tried under the provisions of that Chapter. The claim must be laid before the Magistrate, before he is committed for trial under S. 213, or is asked to show cause under S. 241, or enters on his defence under S. 256, as the case may be (S. 443). If the Magistrate does not reject the claim then the case is tried under the special procedure enacted in Ch. XXXIII. If the Magistrate rejects but the Sessions Judge on appeal allows it, the Magistrate must follow that procedure. One of its special features is that if the case is a warrant case, the Magistrate enquiring into or trying the case shall, if he does not discharge the accused under S. 209 or S. 253 as the case may be, commit

6. Bhajoo Majhi (1929) 57 C. 1062 : 34 C. W. N. 106 : A. I. R. 1930 C. 291 : 125 I. C. 733.
7. Ajit (1932) 33 Cr. L. J. 869 : A. I. R. 1932 C. 750 : 140 I. C. 18.

8. Shaheb Ali (1931) 58 C. 1272 : 35 C. W. N. 711 : 54 C. L. J. 307 : 33 Cr. L. J. 129 ; A. I. R. 1931 C. 793 : 135 I. C. 435.

the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court ; and the Court of Session shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of S. 275, and the provisions of that Section and the other provisions of Ch. XXIII, so far as they are applicable, shall apply accordingly (S. 446 (2)).

Chapter XXXIII applies only when both the parties are British subjects. It does not apply where either party is an Indian but not a British subject but a subject of a Native State, or an European but not a British subject, or an American, or where both the parties are Indians or not Indians. It also does not apply to a case in the Presidency towns, whoever may be the parties.

In those cases where the provisions of Ch. XXXIII do not apply, or where they arise within a Presidency town, the accused, if he claims to be dealt with as an Indian British subject, or an European British subject or an European only or an American, shall, under the provisions of Ch. XLIV-A, state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial, and the Magistrate, if he allows the claim after due inquiry, shall deal with him accordingly. If the Magistrate rejects the claim, and the person who made that claim is committed by him to the Court of Session, then he can repeat his claim before the said Court of Session, which, if it allows the claim, shall deal with him accordingly (S. 528A). The claim must first be made before the Magistrate in the course of the inquiry or trial. It cannot be made for the first time in the Court of Session.

The above provisions in the Code will explain the meaning of the expression "*person who has been found under the provisions of this Code*" to be an European British subject &c. (S. 275). A person is found such indirectly under the provisions of Ch. XXXIII for when a claim is made to have the special procedure applied to a case, the claim can be decided only after a finding being arrived at that on one side is an European British subject and on the other side an Indian British subject ; while under the provisions of Ch. XLIV-A, a person is found such directly because he claims to be dealt with as such. The effects of establishing such a claim are, amongst others :—

(1) In cases involving racial complexion, the accused, whether an European or an Indian British subject, gets the benefit of a Jury trial before a Court of Session in all warrant cases, including cases not exclusively triable by the Court of Session (S. 446 (1)).

(2) In trials before the Court of Session of such cases, the accused automatically gets the privilege of having the majority of the Jury chosen of his own nationality (S. 446 (2)).

(3). In other cases (not involving racial complexion, triable by Jury, the accused, when an European or an Indian British subject, an European or an American, if he so requires before the first juror is called and accepted, shall have the benefit of being tried by a Jury, the majority of which shall be of his own nationality (S. 275).

(4) If the accused be an European British subject, the Sessions Judge cannot pass any sentence on him other than a sentence of death, penal servitude or imprisonment with or without fine, or of fine (S. 34A). So no sentence of whipping or transportation can be passed on him,

When a person has been found under Ch. XLIV-A of the Code to be an European British subject, he is entitled to the benefit of Ss. 275 and 284A.⁹

If the committing Magistrate has refused a claim, the accused may repeat his claim before the Sessions Judge (S. 528A (2)) while requiring at the same time that the Jury shall be so chosen that the majority may be composed of his own race. The Sessions Judge shall have to decide the claim first before proceeding to choose jurors, and if he finds the claim to be true, he shall proceed to choose the jurors accordingly ; otherwise the ordinary course will follow. If the Sessions Judge rejects the claim, the rejection will form a ground of appeal against the sentence (S. 528A (3)). So, it has been held that to enable an accused person who is an Indian British subject to be tried by a Jury consisting of the majority of his countrymen, it is a condition precedent that he should have claimed that right before the committing Magistrate, who is then to inquire into the matter and give his finding thereon, which, if adverse to the accused, may be challenged in subsequent proceedings, and that an accused person is debarred from setting up such a plea at any subsequent stage.¹⁰ If the accused does not repeat his claim before the Sessions Judge, he shall be deemed to have waived it (S. 528B). S. 528A (2) does not make any mention of the High Court ; so, if the Presidency Magistrate rejects a claim and commits the case to the High Court for trial, or if no claim at all is made before the Presidency Magistrate, the claim to the majority of the Jury of the same race cannot be made in the High Court under S. 275. For, it has been held that the High Court exercising original criminal jurisdiction is not a Court of Session within the meaning of the Code of Criminal Procedure ; that under S. 6 of the Code, Courts of Session belong to a class of Courts different from the High Courts ; and that the scheme of the Code is to regard the High Court exercising original criminal jurisdiction as being a Court of an entirely different class and character from a Court of Session and the two expressions as used in the Code are not interchangeable.¹¹ But the Rangoon High Court at one time held that even if the claim was not made at all under S. 443 before the Magistrate, the claim under S. 275 can be raised in the High Court Sessions.¹² This view has now been overruled¹³. But a claim cannot be made after some jurors have been accepted,¹⁴ The requirement under S. 275 must be made before the "first Jury is called and accepted", which taken with the provisions in S. 277 means before the first Jury is accepted without challenge or inspite of the challenge.

The Code is silent as to what would happen if there are more than one European British subject, or more than one Indian British subject accused. In the case of choosing assessors, S. 284 A provides that in such a case all the accused must jointly require to be tried

9. Hay (1925) 2 O. W. N. 469 : 26 Cr. L. J. 1217, 1221, 1222 : A. I. R. 1925 O. 469 : 88 I. C. 833.

10. Soomar Abdulla (1928) 22 S. L. R. 472 : 29 Cr. L. J. 721 : A. I. R. 1929 S. 23 : 110 I. C. 577.

11. Harendra (1921) 51 C. 980 : 29 C. W. N. 384 : 26 Cr. L. J. 385 : A. I. R. 1925 C. 384 : 84 I. C. 829.

12. Zagariya (1925) 3 R. 220 : 26 Cr. L. J. 1371 : A. I. R. 1925 R. 239 : 89 I. C. 459.

13. Scott (1934) 13 R. 134 (F. B.) : 36 Cr. L. J. 595 : A. I. R. 1935 R. 67 : 154 I. C. 837.

14. Zagariya (1925) 3 R. 220 : 26 Cr. L. J. 1371 : A. I. R. 1925 R. 239 : 89 I. C. 459.

according to the provisions of that Section. It would seem, therefore, that under S. 275 it is not necessary that all the accused must jointly require to be tried accordingly.

If the case is one not ordinarily triable by Jury but with the aid of assessors, then the assessors will be chosen according to the provisions of S. 284 A. In the latter case, not the majority only but all the assessors shall be of the same race with the accused.

It should be noticed that in the case of Europeans (not British subjects) and Americans, it has been provided that the majority of such jurors shall be chosen, "if practicable". The reason is that it is quite possible that a sufficient number of persons of the aforesaid nationality may not be found in the locality where the trial is being held. A person who cannot satisfy the definition of European in S. 4(1) (i) is not an European. *Quaere*—whether every person who is a European British subject within the definition of S. 4(1) (i) is a European within the meaning of S.275.¹⁵ Except as provided for in S. 275(2) no other special privileges are given to Europeans other than European British subjects and such Europeans can be tried by Indian Courts.¹⁶

In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together ; but if he requires to be tried in accordance with the provisions of S. 275 or S. 284 A, and is tried, and the other accused person requires to be tried separately, such other person shall be tried separately in accordance with the provisions of Chapter XXIII. (S. 285A.)

Lists of persons liable to serve as common jurors and as special jurors are prepared for the High Court every year by the Clerk of the Crown, subject to such rules as the High Court may prescribe from time to time (Ss. 313-314). They contain the names of Europeans, Americans, as well as Indians.

List of jurors, common and special, is prepared for the Sessions Court by the Sessions Judge and the Collector, or some other officer specially authorised, of the District, and they contain the name, place of abode, quality and business of every person included in the list ; and if the person is an European or an American, the list shall mention the race to which he belongs. These lists have to be revised every year (Ss. 321-325). An order restoring the names of the Jurors which were cancelled from the list is not a judicial order.¹⁷ Provision has been made in S. 326 (3) & (4) for summoning the necessary number of Europeans and Americans where the accused person is an European or American.

The application of the provisions of S. 275 to a person not entitled to its benefits does not invalidate the trial if such person does not object (S. 528 C).

A native Christian cannot claim jurors of the same faith¹⁸ ; nor any other Indian, of a

15. Guthrie (1933) 13 P. 177 : 35 Cr. L. J. 827 : A. I. R. 1934 P. 200 : 148 I. C. 933.

16. Rego (1933) 29 N. L. R. 251 : 34 Cr. L. J. 505 : A. I. R. 1933 N. 136 : 143 I. C. 17.

17. Nagendra (1933) 38 C. W. N. 363 : 36 Cr. L. J. 68 : A. I. R. 1934 C. 487 : 152 I. C. 210.

18. Bharut Chunder (1864) 1 W. R. 2,

mixed panel of Hindus and Mahomedans, though the Judge might make some arrangements, on application made before the jurors are summoned.¹⁹

For the definition of "European British subject" See S. 4(1) (i). For the definition of "India" and "British India", see the General Clauses Act, X of 1897, S. 3.

3. Method of Choosing Jurors—The number and composition of jurors being first settled, choosing of jurors takes place from the persons summoned to act as such. Ss. 315 and 316 of the Code provide for the number of jurors to be summoned to attend the High Court Sessions. The High Court may sometimes sit outside the town which is the usual place of its sitting, for the exercise of its original criminal jurisdiction (S. 335). When it sits within the town a discretion as to the number of jurors, both sepcial and common, to be summoned, is left to the Clerk of the Crown. When it sits outside the town, the Court of Session of the place where it sits, subject to any direction which may be given by the High Court, shall summon a sufficient number of jurors from its own lists, in the manner prescribed for summoning jurors to the Court of Session. The Court of Session is also authorised to summon military men as jurors, whenever necessary, to make up the Jury required for the trial before the High Court sitting outside the town ; such military men must be residing within ten miles of the place of sitting (S, 317).

The mode of summoning jurors to attend a Court of Session is provided for in S. 326. The number to be summoned must not be less than double the number required for the trial and including, when an accused person is an European or American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors (S. 326). It is not, however, the intention of the Legislature to have a large area of selection in persons attending on the summonses ; a trial in a murder case with a jury of 9 chosen out of 14 jurors summoned is not invalid because the number summoned is not 18 as required by S. 326. It is neither illegal nor irregular for the Sessions Judge to summon less than 18 persons for a murder trial so long as he takes care to summon a sufficient number of persons to enable him to choose the required number of jurors from among them in the manner provided by law. Even assuming that it is incumbent on him to do so, the failure to do so would generally be condoned under S. 537 of the Code unless it is manifest that there has been a failure of justice.²⁰ The case of *Serajul Islam v. E.*²¹ in which in a murder trial 12 jurors were summoned, of whom 8 appeared and of them 7 were taken and the convic-

19. Jessarat (1925) 29 C. W. N. 526, 527 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

20. Erman Ali (1930) 57 C. 1228 (F. B.) : 34 C. W. N. 296 : 51 C. L. J. 171 : 31 Cr. L. J. 536 : A. I. R. 1930 C. 212 : 123 I. C. 664.

21. *Serajul Islam* (1927) 55 C. 794 : 29 Cr. L. J. 927 : A. I. R. 1928 C. 945 : 111 I. C. 735 [This case was followed in *Dwarika Malo* (1929) 56 C. 1154 : 33 C. W. N. 692 : 31 Cr. L. J. 377 : A.I.R. 1930 C. 60 : 122 I. C. 219 ;

Amir Khan (1929) 33 C. W. N. 1053 : 51 C. L. J. 574 : 31 Cr. L. J. 425 : 122 I. C. 557 ; *Tamizuddin* (1929) 33 C. W. N. 1054 : 31 Cr. L. J. 426 : 122 I. C. 558 ; all of which, so far as they say that the provision as to double the number is mandatory have been overruled by *Erman Ali* (1930) 57 C. 1228 (F. B.) : 34 C. W. N. 296 : 51 C. L. J. 171 : 31 Cr. L. J. 536 : A. I. R. 1930 C. 212 : 123 I. C. 664].

tion and sentence was set aside, can be explained, as has been observed in *Lala v. E.*²² on the ground that the summoning of a lesser number of persons than required by S. 326 did prejudice the accused. The Allahabad High Court has held in the latter case that in spite of the word "shall" in S. 326, the direction therein is not necessarily mandatory; the underlying principle in a trial by Jury is to secure an impartial trial by rendering impossible any intentional selection of jurors to try a particular accused, and an accused person has a right to claim to be tried by a Jury chosen with strict regard to all the safe-guards provided in the Code to secure perfect impartiality; but a neglect of the strict provisions of S. 326 does not make the constitution of the Jury illegal or render the trial a nullity, if no failure of justice is occasioned, the defect being cured by S. 537.

Objection that the Jury were not empanelled in the manner prescribed by law will be taken notice of by the High Court even if it be raised at a late stage in the appeal, because it involves a question of jurisdiction going to the root of the trial.²³

The cases where special jurors are to be summoned have been mentioned in the 3rd and 4th provisos to S. 276. Trial for sedition under S. 124A I. P. C. should be by Special Jury.²⁴ Special jurors are usually had when the matters to be tried are of too great a nicety for common jurors.

Penalty for non-attendance of the jurors summoned, has been provided for, when the trial is before the High Court, by S. 318, and when it is before the Court of Session, by S. 332. The Court has an inherent power of exempting a particular juror for good reasons.²⁵ It has also an inherent power to choose in a particular case only such persons as are able to read English.²⁶

When the jurors summoned attend the Court, the choosing of a Jury takes place in the manner stated in Ss. 276-279 of the Code. S. 276 with all its provisions is a general Section dealing with the general nature of the procedure, and the details of that procedure are to be worked out with reference to Ss. 277-279. These Sections must be read together as prescribing one continuous procedure for the empanelling of juries according to circumstances.²⁷

S. 276 provides that the jurors shall be chosen by lot from the persons summoned as aforesaid in such manner as the High Court may from time to time by rule direct. If the Judge himself selects jurors instead of choosing them by lot, he acts contrary to the provisions of the Section; but the verdict of the Jury so chosen will not be interfered with, if the prisoner

22. *Lala* (1933) 56 A. 210 : 1933 A. L. J. 1446 : 35 Cr. L. J. 668 : A. I. R. 1933 A. 941 : 148 I. C. 339.

23. *Intaz Mandal* (1928) 32 C. W. N. 1172 : 30 Cr. L. J. 484 : A. I. R. 1929 C. 92 : 115 I. C. 522.

24. *Spratt* (1927) 30 Bom. L. R. 313 : 29 Cr. L. J. 411 : A. I. R. 1928 B. 74 : 108 I. C. 509.

25. *Sonia* (1926) 28 Cr. L. J. 177 : A. I. R. 1927 N. 117 : 99 I. C. 849.

26. *Mohiuddin* (1930) 51 C. L. J. 352 : 32 Cr. L. J. 455 : A. I. R. 1930 C. 437 : 129 I. C. 834.

27. *Lala* (1933) 56 A. 210 : 1933 A. L. J. 1446 : 35 Cr. L. J. 668 : A. I. R. 1933 A. 941 : 148 I. C. 339 ; *Per Mukerji J* in *Kedar Nath* (1927) 55 C. 371 (F. B.) : 32 C. W. N. 221 : 47 C. L. J. 43 : 29 Cr. L. J. 437 : A. I. R. 1928 C. 83 : 108 I. C. 577.

is not in any way prejudiced.²⁸ Where a Judge instead of conducting a second ballot out of the jurors present in Court as required by rule 14 of the Oudh Criminal rules chose the required number from amongst them, and the accused on being asked whether he had any objection stated that he had none and the trial proceeded ; it was held that there was no illegality but only an irregularity curable by S. 537 Cr. P. C. .²⁹

But where instead of choosing jurors by lot as required by S. 276 and then hearing and deciding objections as provided by Ss. 276 to 279, the Judge proceeded to exempt some of the persons present merely on their own representation and tried the accused with the rest, and where it further appeared that the persons summoned to act as jurors had not been selected in the manner prescribed by S. 326 Cr. P. C. ; *held*, that the irregular procedure, in as much as it affected the constitution of the Court, was not curable by S. 537 Cr. P. C. .³⁰ And where out of the jurors summoned only the requisite number appear and they constitute the Jury, the Jury is not properly constituted.³¹ On the other hand, where only 5 jurors were present though 10 were summoned and those 5 were chosen by drawing the names from the jurors summoned including those who were absent and these 5 constituted the Jury without objection by the accused ; *held* that there was no irregularity, and even if there was any it was cured by S. 537.³² Instances are not uncommon of accused obtaining by express request a body of jurymen acquainted with the English language.³³ When the Judge began the selection of jurors the Public Prosecutor pointed out that there were certain documents in English, the identity of the hand-writing of which was a fact in issue ; the Judge proceeded with the consent of the accused's Counsel to choose the Jury by lottery from amongst those able to read English ; *held*, that in doing so the Judge did not exceed the inherent powers that he had in ensuring a fair trial.³⁴ The 'High Court' in this Section is not limited in its meaning as in S. 266, but is used in the more extended sense as defined in S. 4 (j). *See Notes under "High Court" in Ch. 1, ante.* Thus the highest Court of criminal appeal or revision in a local area, and not necessarily a chartered High Court or a Chief Court may frame such a rule, the reason being that the framing of such a rule is a departmental measure and not a judicial part of a trial.

As regards the choosing of jurors by lot, Bayley. J. in the case of *R. v. Vithaldas Pranjivandas* (1876) 1B. 462, said that when nine persons are to be chosen by lot to form the Jury they ought to be selected from the entire number of persons summoned to act as jurors and that the selection by lot ought to be made from one box and not from six boxes (separate

28. Jhubboo Mahton (1882) 8 C. 739 ; Sonia (1926) 28 Cr. L. J. 177 ; A. I. R. 1927 N. 117 ; 99 I. C. 849 ; *In re Anipe Palladu* (1916) 1917 M. W. N. 1 : 18 Cr. L. J. 15 : 36 I. C. 847.
29. Ram Adhin (1929) 6 O. W. N. 97 : 30 Cr. L. J. 384 ; A. I. R. 1929 O. 154 : 114 I. C. 814 [following Jhubboo Mahton (1882) 8 C. 739 and dissenting from Bradshaw (1911) 33 A. 385 : 12 Cr. L. J. 46 : 9 I. C. 278]

30. Brojendra (1902) 7 C. W. N. 188.

31. Tajali (1927) 28 Cr. L. J. 843 ; A. I. R. 1928 P. 31 : 104 I. C. 459.

32. Akbar Ali (1927) 7 P. 61 : 28 Cr. L. J. 881 ; A. I. R. 1928 P. 1 : 104 I. C. 897.

33. Muthoora Singh (1872) 18 W. R. 66. Cf. S. 278 Cl. (g) of the Code.

34. Mohiuddin (1930) 51 C. L. J. 352 : 32 Cr. L. J. 455 ; A. I. R. 1930 C. 437 : 129 I. C. 834.

ballot boxes marked outside Europeans, Indo-Britons, Portuguese, Parsees, Hindus and Mahomedans) as was the previous practice. In empanelling a Jury in the case of a statutory majority of Europeans or Indians the practice which obtains in the Calcutta High Court Sessions is to draw the names first from a mixed ballot until the defence has exhausted its challenges, then to draw only European or Indian names discarding the Indians or the Europeans as the case may be, in order to make up the required number for the statutory majority (*Vide* Crown Side Rules, 23 and 23A. at pp. 488-9 of the High Court Original Side Rules).

Proviso (2) to S. 276 says : "In case of a deficiency of persons summoned the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present".

In interpreting the proviso, there was a conflict of decisions and the matter came up before a Full Bench³⁵ of the Calcutta High Court. Buckland, J., who delivered the judgment of the Full Bench, explained the working of the proviso as follows :-

"It is to be presumed that the total number summoned is that required by S. 326, that is to say, at least ten, for a jury of five, and in the aggregate there may be more. This will depend upon the number required for the Sessions and stated in the letter to the District Magistrate. On the names being drawn from the box, one by one, each after another, and called aloud as each is drawn, it will become apparent who has not attended, and it is only when all the names have been so drawn and a number of persons insufficient for the purpose of constituting a Jury have answered to their names, that the deficiency will become manifest. The deficiency will be the number by which the number of persons answering their names and empanelled falls short of the number of persons of which the Jury should consist. It is then and not until then that the proviso begins to operate ; and on that point being reached, the Court has to exercise a discretion whether to allow persons to be chosen from among the bystanders in sufficient number to supply the deficiency, or whether to adjourn the case for a fresh Jury to be summoned". The learned Judge then summarises thus :—"The Section (276) provides, in the first instance, for a ballot among the persons summoned under S. 326, all of whom may or may not be present. When their names have been exhausted, if a Jury has not yet been empanelled, the Court may, in its discretion, allow the number requisite to complete the Jury to be chosen from among the bystanders, or may adjourn the case for a fresh Jury to be summoned. As each name is drawn and called aloud, if the person summoned answers, or as each juror is chosen from among the bystanders, should that point have been reached and that course be permitted, the accused shall be asked if he objects to be tried by such juror. Should the objection be allowed the Court should proceed as laid down in S. 279 (2), adopting the course prescribed according

35. Kedar Nath (1927) 55 C. 371 (F. B.) : 32 C. W. N. 221 : 47 C. L. J. 43 : 29 Cr. L. J. 437 : A. I. R. 1928 C. 83 : 108 I. C. 577 [dissenting from Bholanath (1926) 44 C. L. J. 541 : 28 Cr. L. J. 194 : A. I. R. 1927 C. 242 : 99 I. C. 930 ; Rosonali (1927) 31 C. W. N.

1102 : 46 C. L. J. 160 : 28 Cr. L. J. 889 : A. I. R. 1927 C. 787 : 104 I. C. 905 ; and approving Rahamat (1927) 54 C. 1026 : 31 C. W. N. 711 : 28 Cr. L. J. 615 : A. I. R. 1927 C. 593 : 102 I. C. 903.

as there are or are not persons left from among those summoned whose names have not been drawn". Mukerji, J. added that the words in 279 (2), "the place of such juror shall be supplied by any other juror attending summonses and chosen in manner provided in S. 276", clearly point to persons, originally summoned to act as jurors, only taking part in the ballot : the Section becomes unworkable if others are to take part in the ballot. Where, therefore,—(1) 10 persons were summoned to serve on the Jury and of these 6 attended ; objection was allowed against one, so 5 remained ; the Judge chose one from among the bystanders in Court, added his name to those of the 5 persons summoned and from these 6 the Jury of five was chosen by lot : *Held*, that the Jury was not empanelled as required by law ; the conviction and sentence were set aside and retrial ordered. (2) 7 persons among those summoned were present ; 2 of them being Europeans not understanding Bengalee were discharged ; 2 persons were chosen from among the bystanders and added to the 5 who remained, which made up a Jury of seven (it being a murder case) : *Held*, that the Jury was properly empanelled ; (3) 7 attended out of 12 summoned, one was excused and out of the remaining 6, five were chosen by lot : *Held*, that the Jury was properly empanelled.³⁶ Clause (2) of S. 276 indicates that the manner of choosing by lot applies only to jurors attending in obedience to summons and not to persons chosen from those present in Court.³⁷

The above Full Bench decision has been followed by the Allahabad High Court in *Lala v. E.*³⁸ in so far as the method of choosing jurors is concerned. It holds that there is no provision in the Code by which the Court is to ascertain beforehand how many of the persons summoned to serve as jurors have attended and thus determine the deficiency which has to be supplied ; that the stage at which it should be ascertained whether they have attended or not is not reached until their names are called out for the purpose of empanelling a Jury ; that the word 'jurors' in proviso (2) means actual jurors and not potential jurors ; and the number of jurors required, therefore, means the number required to make up the quorum under S. 274 ; that the word "chosen" in proviso (2) simply means selected ; and that the "deficiency" in S. 276 refers to the number required to form the quorum and not the deficiency of persons summoned for the purpose of making up the minimum number of ten amongst whom lots are to be drawn.

When on drawing lot it was found that some absent jurors were also chosen and consequently substitutes for them were obtained by process of elimination and no objection was taken to the appointment of five jurors present, the constitution of the Jury is valid and the trial is not illegal.³⁹ The required number may be chosen without lot from the persons

36. Kedar Nath (1927) 55 C. 371 (F. B.), at Pp. 389, 390 : 32 C. W. N. 221 : 47 C. L. J. 43 : 29 Cr. L. J. 437 : A. I. R. 1928 C. 83 : 108 I. C. 577. See also Panchu (1930) 34 C. W. N. 1154 : 32 Cr. L. J. 190 : A.I.R. 1931 C. 178 : 128 I. C. 811.

37. In re Anipe Palladu (1916) 1917 M. W. N. 1 : 18 Cr. L. J. 15 : 36 I. C. 847.

38. Lala (1933) 56 A. 210 : 1933 A. L. J. 1446 : 35 Cr. L. J. 668 : A. I. R. 1933 A. 941 : 148 I. C. 339 [dissenting from Bradshaw (1911) 33 A. 385 : 12 Cr. L. J. 46 : 9 I. C. 278].

39. Akbar Ali (1927) 7 P. 61 (S. B.) : 28 Cr. L. J. 881 : A. I. R. 1928 P. 1 : 104 I. C. 897 [overruling Tejali. (1927) 7 P. 50 : 28 Cr. L. J. 843 : A. I. R. 1928 P. 31 : 104 I. C. 459].

present, though not on the Jury list.⁴⁰ Out of 18 jurors summoned, only 8 were present and the Judge empanelled a Jury of seven by lot out of 8 and tried the case : *Held*, that the constitution of the Jury was not illegal.⁴¹

'Persons present in Court' means persons who are within the precincts of the Court-building, either because they have been summoned for other cases or by mere chance ; they need not be within the four walls of the room.⁴² Requisition of persons from outside Court to make up the deficiency in the number of jurors to be empanelled is not proper.⁴³

The word "jurors" in the proviso (2) is a general term meaning both special and common jurors.⁴⁴ Where special jurors to the number of 18 had been summoned but only 5 of them were present : *Held*, that it was open to the Judge to supplement the five special jurors who were available and who were chosen by lot and one special juror who happened to be present with three persons who were jurors awaiting in another Court but presumably were not on the special jury list at all.⁴⁵

4. Objections against jurors, Grounds of (Ss. 277-278)—

As each juror is chosen his name shall be called out and, upon his appearance, the accused shall be asked if he objects to be tried by such juror. Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated (S. 277). In the High Court, however, objections without grounds stated shall be allowed to the number eight on behalf of the Crown and eight on behalf of the accused, or all the accused (S. 277 proviso). From the use of the expression "before the first juror is called and accepted" in S. 275, it seems clear that the Code contemplates the objection being taken simultaneously with the appearance of the juror in Court on his name being called out and before the second juror is called. When no objection is taken by either side or if the objection be disallowed, it should be deemed that the juror has been accepted. In England, it seems, Counsel can challenge any juror at any stage of the proceeding, before he is sworn (*Reg. V. Frost*, 9 C. & P. 136). There the prisoner may challenge peremptorily 35 jurymen in cases of treason, 20 in cases of felony and none in cases of misdemeanour.

The omission to ask the accused under S. 277 (1) if objects to be tried by the juror whose

40. Muchu (1924) 29 C. W. N. 652 : 26 Cr. L. J. 819 : A. I. R. 1925 C. 798 : 86 I. C. 467.

41. Mukunda (1933) 61 C 190 : 36 Cr. L. J. 803 : A. I. R. 1934 C. 10 : 155 I. C. 599 [relying on *Serajul Islam* (1927) 55 C. 794 : 29 Cr. L. J. 927 : A. I. R. 1928 C. 645 : 111 I. C. 735 ; *Dwarika Malo* (1929) 56 C. 1154 : 33 C. W. N. 692 : 31 Cr. L. J. 377 : A. I. R. 1930 C. 60 : 122 I. C. 219 ; and *Erman Ali* (1930) 57 C. 1228 (F. B.) : 34 C. W. N. 296 : 51 C. L. J. 171 : 31 Cr. L. J. 536 : A. I. R. 1930 C 212 : 123 I. C. 664 J].

42. *Israil* (1932) 59 C. 1123 : 36 C. W. N. 377 :

55 C. L. J. 132 : 33 Cr. L. J. 694 : A. I. R. 1932 C. 536 : 138 I. C. 756.

43. *Ibidali* (1928) 56 C. 835 : 33 C. W. N. 722 : 31 Cr. L. J. 281 : A. I. R. 1929 C. 728 : 121 I. C. 569 ; *Sagruddin* (1927) 30 Cr. L. J. 120 : A. I. R. 1928 C. 551 : 113 I. C. 280 ; *Sadarat* (1928) 48 C. L. J. 479 : 30 Cr. L. J. 136 : 113 I. C. 328.

44. *Shaheb Ali* (1931) 58 C. 1272 : 35 C. W. N. 711 : 54 C. L. J. 307 : 33 Cr. L. J. 129 : A. I. R. 1931 C. 793 : 135 I. C. 435.

45. *Manir Sheikh* (1933) 60 C. 725 : 34 Cr. L. J. 1098 : A. I. R. 1933 C. 638 : 145 I. C. 889.

name has been called aloud, is an irregularity not affecting the conviction, in the absence of prejudice.⁴⁶

The grounds on which objections may be taken are specified in S. 278. If these grounds are made out to the satisfaction of the Court, it shall decide in favour of the objection and the decision shall be recorded and be final (S. 279 (1)), The Judge has a wide and final discretion in the matter⁴⁷; but the objections, if taken, must be decided judicially and not turned down as frivolous.⁴⁸ Another juror will then be chosen in the manner provided by S. 276, i. e. by lot, and so on, in the case of as many objections as are found good. In case there is no other juror left amongst those summoned, the Court may either postpone the case and summon a fresh number of jurors, or the place of the objected juror shall be supplied "by any other person present in Court whose name is on the list of jurors or whom the Court considers a proper person to serve on the jury" (S. 279 (2)). It is evident from the passage quoted above that a person present in Court but whose name is not in the Jury list may be chosen as a juror if he is otherwise considered a proper person. See Notes under the heading "*Method of choosing jurors*" ante.

The first ground of objection (S. 278 (a)) is some "presumed or actual partiality" in the juror. It corresponds to "implied or actual bias" in the New York Criminal Procedure Code, Ss. 377 and 376, the provisions of which are given below to illustrate the two kinds of partiality mentioned in the Indian Code :—

"(a) *Implied bias*—A challenge for implied bias may be taken for all or any of the following causes and no other :—(1) consanguinity or affinity within the 9th degree to the person alleged to be injured by the crime charged, or on whose complaint the prosecution was instituted, or to the defendant; (2) bearing to him the relation of guardian or ward, attorney or client, or client of the attorney, or Counsel for the people or defendant, master or servant, or landlord or tenant or being a member of the family of the defendant, or of the person alleged to be injured by the offence charged, or on whose complaint the prosecution was instituted, or in his employment on wages; (3) being a party adverse to the defendant in a civil action, or having complained against or been accused by him in a criminal prosecution; (4) having served on the Grand Jury which found the indictment, or on a Coroner's Jury which inquired into the death of a person whose death is the subject of the indictment; (5) having served on a Trial Jury which has tried another person of the crime charged in the indictment; (6) having been one of a Jury formerly sworn to try the same indictment, and whose verdict was set aside, or which was discharged without verdict, after the cause was submitted to it; (7) having served as a juror in a civil action brought against the defendant, for the act charged as a crime; (8) if the crime charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty. In any of these cases he shall neither be permitted nor compelled to serve as a juror.—S. 377.

46. Illahi (1909) 13 C. W. N. cxi.

47. Muchu (1924) 29 C. W. N. 652; 26 Cr. L. J.

819: A. I. R. 1925 C. 798: 86 I. C. 467.

48. Krishno Churan (1871) 16 W. R. 66.

“(b) *Actual bias*—A challenge for actual bias may be taken for the existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the Court, in the exercise of a sound discretion, that such juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. But the previous expression or formation of an opinion or impression in reference to the guilt or innocence of the defendant, or a present opinion or impression in reference thereto, is not a sufficient ground of challenge for actual bias, to any person otherwise legally qualified, if he declare on oath that he believes that such opinion or impression will not influence his verdict, and that he can render an impartial verdict according to the evidence, and the Court is satisfied that he does not entertain such a present opinion or impression as would influence his verdict.—S. 376.”

Where there are reasonable grounds for presuming partiality in a juror the Judge is bound to allow the objection.⁴⁹ In order to found a challenge it is not competent to ask a juryman if he has not previously to the trial expressed an opinion hostile to the accused or their cause, but such expressions must be proved by extrinsic evidence.⁵⁰

The word ‘alienage’ in clause (b) of S. 278 means the condition of an alien, a foreigner ; and the word ‘Court’ in clause (d) refers to the Court trying the case.

The last ground of objection is stated in a general form as “any other circumstance which, in the opinion of the Court, renders him improper as a Juror” (S. 278 (h)). The following has been held not to be good grounds on which objections may be made :— (1) Want of knowledge of English⁵¹ ; creed of juror⁵² ; acquaintance of a juror with the Public Prosecutor who was the am-muktear of the juror’s landlord⁵³ ; employment of the juror as a clerk in the District Magistrate’s office.⁵⁴

Under the Code of 1861 an appellant complained that he, a stranger and foreigner, was tried by a Jury ignorant of his language and his ways and so he had not a fair trial. Campbell, J. referred to the SS 323, 343 and 349 of the Code as securing to him the rights to which he was entitled and called for a certificate from the Sessions Judge as to whether the requirements of the law were complied with.⁵⁵

5. Offences concerning jurors.

A juryman is a public servant [See S. 21 cl (5), I. P. C.]. S. 229 I. P. C. deals with false personation or a juror or assessor and applies to two classes of cases : 1st. where he had guilty knowledge before he was returned ; and 2nd. where he has such knowledge after he was returned. The word ‘returned’ in the Section means getting oneself enlisted as a juror or assessor. It is a misdemeanour at Common Law for a person to pretend to be a qualified

49. *Tajali* (1927) 7 P. 50 : 28 Cr. L. J. 8,3 : A. R. 1928 P. 31 : 104 I. C. 459.

50. *Edmonds*, 4 B & Ald 476.

51. *Re Mammadi* (1900) 2 Weir 515, 516.

52. *Ilahi* (1909) 13 C. W. N. cxi.

53. *Jessarai* (1925) 29 C. W. N. 526, 527 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

54. *Rochia Mohato* (1881) 7 C. 42.

55. *Londley* (1865) 3 W. R. 14.

juryman and go into the jury-box and act in the name of a qualified juryman, and this without any corrupt motive.⁵⁶

6. Indemnity of jurors.

No juror, properly empanelled, is accountable for, nor will any action lie against him in respect of anything said or done by him in the discharge of his office.⁵⁷ But this privilege does not extend to a person not returned by a Sheriff, but who by confederacy with a Clerk of the Court procured himself to be called and sworn on the Jury with intent to serve some malicious purpose.⁵⁸

7. Foreman of the Jury.

When the necessary number of jurors have been chosen, they shall appoint one of their number to be the foreman. If the majority of the Jury do not within a reasonable time agree in the appointment of a foreman, he shall be appointed by the Court. The function of the foreman is to preside in the debates of the Jury, deliver the verdict of the Jury and ask any information from the Court that is required by the Jury or any of the jurors. (S. 280).

8. Swearing of the jurors.

The Code of 1861, did not require jurors to be sworn. Under the said Code it was said by Couch C. J., of Bombay: "We have ascertained from the High Court of Calcutta that the practice of swearing the Jury is not observed in those districts of the Bengal Presidency where the system of trial by Jury has been in force under the provisions of the Code of Criminal Procedure; and there is nothing in the Code to show that it was intended that the Jury should be sworn."⁵⁹ After the passing of the Indian Oaths Act (X of 1873), the jurors were required to be sworn under that Act (S. 281). It was presumed in a case under the Code of 1872, when Act X of 1873 had come into force, that omission to administer oath to the jurors would be curable by S. 13 of that Act.⁶⁰

9. When a new juror shall be added or the Jury discharged and a new Jury chosen before the return of the verdict.

S. 282 mentions three circumstances under which this shall be done :—

(1) When any juror, from any sufficient cause, is prevented from attending throughout the trial. If a juror be unable to attend on a particular time or day of the trial for good cause, the Court may adjourn the hearing for a short time under the provisions of S. 344 (1). But if he becomes unable to attend throughout the trial, as for instance on account of illness,⁶¹ the Court shall cause a new juror to be added, if that is practicable, or shall discharge the Jury and proceed to choose a new Jury.

56. Clark (1918) 26 Cox 138.

57. Halsbury's Laws of England, Hailsham Edn. Vol. XIX, *Juries*, para 683. The privilege is discussed in *Bushell's Case*, (1670) 6 St. Tr. 999.

58. *Scarlet's Case* (1612) 12 Co. Rep. 98.

59. *Lakshuman* (1867) 3 Bom. H. C. R. Cr. Cas. 56.

60. *Ramsodoy* (1873) 20 W. R. 19.

61. *Monmotha* (1926) 31 C. W. N. 144 : 28 Cr. L. J. 141 : A. I. R. 1927 C. 199 : 99 I. C. 349.

(2) Or, if any juror absents himself and it is not practicable to enforce his attendance. A juror failing to attend without lawful excuse is liable to a fine not exceeding 100 rupees, under S. 332.

(3) Or, if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted. This may include the case of a juror, who is deaf.⁶² It has been held by the Privy Council that even after the verdict resulting in the conviction and sentence of the accused, if it transpires from evidence that one of the members of the Jury had not sufficient knowledge of the English language to follow the proceedings, the conviction and sentence must be set aside, as it was a clear miscarriage of justice; and that the juror whose competency is challenged may be examined for or against the allegation.⁶³

In all the above cases, the Judge has a discretion to discharge the Jury or have another juror, and if the order of discharge is good, the High Court will not interfere. Re-summoning a discharged Jury would be improper and inconvenient, save in very exceptional circumstances.⁶⁴ In either case, the trial must commence afresh (S. 282 (2)), and the reading over to the witnesses of their previous depositions has been held illegal.⁶⁵

A Sessions Judge cannot, on account of the absence of a witness, discharge a Jury and direct a fresh trial to be held; he may adjourn the trial if he considers necessary or advisable to do so under S. 344.⁶⁶ It is not a ground for discharging a Jury merely that evidence for the Crown is not forthcoming or that a material witness for the Crown refuses to give evidence.⁶⁷

The Judge may also discharge the Jury whenever the prisoner becomes incapable of remaining at the bar (S. 283).

Ss. 282 and 283 are not exhaustive of the circumstances under which a Jury can be discharged and the trial commenced anew. It is only as far as it deals with any point specifically that the Code of Criminal Procedure is exhaustive and the law is to be ascertained by reference to its provisions. Thus, where the question of misconduct on the part of the Jury or other similar sufficient cause arises, the Sessions Judge has inherent power to discharge the Jury and empanel another, but such power to discharge the Jury on such grounds is not to be exercised lightly, nor until the Judge has satisfied himself by such form of enquiry as in the circumstances he can adopt that reasonable grounds for exercising such a right exists. The

62. Narain (1914) 36 A 481 : 15 Cr. L. J. 538 : 24 I. C. 946. See also Virasami (1896) 19 M. 375.

63. Ras Behari (1933) 60 I. A. 354 : 38 C. W. N. 11 : 58 C. L. J. 300 : 12 P. 811 : 35 Bom. L. R. 1087 : 65 M. L. J. 513 : 1933 A. L. J. 893 : 34 Cr. L. J. 843 : A. I. R. 1933 P. C. 208 : 144 I. C. 911.

64. Monmotha (1926) 31 C. W. N. 144 : 28 Cr.

L. J. 141 : A. I. R. 1927 C 199 : 99 I. C. 349. Abdur Rashid (1929) 56 C. 1032 : 33 C. W. N. 425 : 31 Cr. L. J. 366 : A. I. R. 1929 C. 343 : 122 I. C. 194.

65. Narain (1914) 36 A. 481 : 15 Cr. L. J. 538 : 24 I. C. 946.

66. Putaswamy (1902) 4 Bom. L. R. 939.

67. Lewis (1909) 2 Cr. A. R. 180.

matter is one for the Judge's discretion. To argue otherwise would involve the proposition that whatever the stage of the trial may be, however gross the misconduct of the Jury and however patent to everybody concerned it may appear, there is no remedy, but that the trial must continue to run its course to conclusion, when it will be open to the presiding Judge to submit the case to the High Court under S. 307. So farcical a procedure would only bring the administration of justice into disrepute. Where the Jury associated with the person looking after the defence, the Judge has the inherent power to discharge them.⁶⁸ In case of an allegation against a juror, the Judge has power to make an enquiry necessary for the ends of justice; such an enquiry is a judicial enquiry in the course of which the Judge is entitled to call upon persons to appear before him, to administer oath to such persons and to require them to give evidence.⁶⁹ It is entirely for the Judge to determine and it is entirely in his discretion to determine whether there was such misconduct on the part of a juror as necessitates a discharge of the Jury and the decision given by the Judge on the question is not open to review.⁷⁰ He has inherent power to discharge the Jury on the ground of suspicion of partiality, after holding a full and careful enquiry, as it is a serious matter. It is competent to the High Court in revision to enquire into the validity of the reasons for discharging the Jury; where a Judge discovers that there are good grounds for suspecting the impartiality of some of the jurors, it is not only discretionary on his part but is incumbent on him to discharge the Jury in order to give the trial a look of fairness; but suspicion in the mind of the Public Prosecutor is not and can never be recognised a valid ground for discharging a Jury; something more definite and tangible than that is necessary.⁷¹ Discharging a juror after empanelling, on the ground of misconduct, and taking in his place another person present in Court, is not objectionable, on analogy with S. 282 Cr. P. C.⁷² The mere circumstance that a juror says to a friend in a private conversation that he did not think the prosecution case to be true in the particular case in which he has been serving as a juror, is not a matter which at the end of the trial can be used as a reason why the trial should be held afresh.⁷³

The adoption of some procedure not expressly authorised by the Code is not necessarily wrong: the Code cannot provide for every possible case.⁷⁴ In the absence of a provision

68. Rahim (1923) 50 C. 872 : 37 C. L. J. 595 : 24 Cr. L. J. 677 : A. I. R. 1923 C. 724 : 73 I. C. 773 : *See also* Jessarat (1925) 29 C. W. N. 526, 527 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.
69. Bhuban Chandra (1927) 55 C. 279 : 31 C. W. N. 828 : 29 Cr. L. J. 783 : A. I. R. 1927 C. 628 : 104 I. C. 111.
70. Nagen Kundu (1934) 61 C. 498 : 38 C. W. N. 501 : 59 C. L. J. 516 : 35 Cr. L. J. 941 : A. I. R. 1934 C. 428 : 149 I. C. 345. *See also* Charles worth (1861) 9 Cox C. C. 44 : 2 F. & F. 326 Q. B. ; Winsor (1866) 1 Q. B. 390 ; Lewis (1909) 2 Cr. A. R. 180.

71. Abdur Rashid (1929) 56 C. 1032 : 33 C. W. N. 425 : 31 Cr. L. J. 366 : A. I. R. 1929 C. 343 : 122 I. C. 194 ; Rahim (1923) 50 C. 872 : 37 C. L. J. 595 : 24 Cr. L. J. 677 : A. I. R. 1923 C. 724 : 73 I. C. 773.
72. Rebati Mohan (1928) 56 C. 150 : 32 C. W. N. 945 : 30 Cr. L. J. 435 : A. I. R. 1929 C. 57 : 115 I. C. 258.
73. Ajit Munshi (1932) 33 Cr. L. J. 869 : A. I. R. 1932 C. 750 : 140 I. C. 18.
74. Pakir Mohamed (1926) 4 R. 106, 108 : 27 Cr. L. J. 1084 : A. I. R. 1926 R. 180 : 97 I. C. 60.

to the contrary in the Cr. P. Code, the English law which recognises the power of the Judge to discharge the Jury either before or after verdict may safely be applied to India as a principle of justice ((1821) 4 B. & A1. 273 followed).⁷⁵ Other instances of misconduct of the Jury are : (1) the formation and expression of opinion before evidence is concluded⁷⁶ (2) or before the address of the Crown⁷⁷ ; (3) conversation with strangers after retirement.⁷⁸ No action can be taken for misconduct unless proved by legal evidence.⁷⁹ Petition not supported by affidavit, wanting in details, is insufficient.⁸⁰ The following, amongst others, have been held to be misconduct on the part of jurors :—Separation after being sworn, before verdict ; receiving evidence or holding any communication with any person on the case, out of Court ; expressing opinion at an early stage of the case ; misleading Counsel by an intimation that they do not wish to hear more evidence for his client ; eating or drinking at the expense of a party.⁸¹

If one of the jurymen who gave the verdict was a person not entitled to sit on the Jury, the verdict must be treated as a nullity.⁸² When there was a verdict by the Jury which was not competent at that time to give a verdict in as much as it had been discharged beforehand, *held* that the conviction of the accused based on such a verdict was illegal.⁸³ The English law on the subject has been summarised thus⁸⁴ :—

“If a person whose name is not on the panel answers to a name called, and is sworn and serves on a Jury, the proceedings taken before such Jury may be set aside, whether the mistake be discovered before or after verdict, but the Court will be slow to interfere with a verdict in the absence of substantial miscarriage of justice, even though the Crown or a prisoner may have been unable to exercise a right of challenge.”

Allegations in a memorandum of appeal from a conviction that one of the jurors was hard of hearing and another ignorant of English and unable to follow the arguments in Court, should be supported by an affidavit filed in time so that the Crown could make the necessary enquiries and file a counter-affidavit, if necessary, before the appeal came on for hearing. An affidavit filed just before the hearing of the appeal cannot be entertained.⁸⁵

75. Nagen Kundu (1934) 61 C. 498 : 38 C. W. N. 501 : 59 C. L. J. 516 : 35 Cr. L. J. 941 : A. I. R. 1934 C. 428 : 149 I. C. 345.

76. Jessarat (1925) 29 C. W. N. 526, 527 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

77. Olu Mahamad (1902) 7 C. W. N. xxxi

78. See S. 300 Cr. P. Code.

79. Mamfru (1923) 51 C. 418, 430, 431 : 38 C. L. J. 397 : 25 Cr. L. J. 776 : A. I. R. 1924 C. 323 : 81 I. C. 264.

80. Jessarat (1925) 29 C. W. N. 526, 528 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

81. Halsbury's Laws of England, Hailsham Ed.

Vol. XIX, Juries, paras 650-652, and the notes thereunder.

82. Irjan (1927) 46 C. L. J. 241 : 28 Cr. L. J. 874 : A. I. R. 1927 C. 820 : 104 I. C. 714.

83. Smith (1934) 1934 A. L. J. 1000 (P. C.) : 1934 M. W. N. 1020 : A. I. R. 1934 P. C. 227 : 151 I. C. 529.

84. Halsbury's Laws of England, Hailsham Ed. Vol. XIX, Juries, para 648. In the note to this paragraph a large number of cases have been referred to.

85. Rashbehari (1932) 13 P. L. T. 440 : 34 Cr. L. J. 83 : A. I. R. 1932 P. 302 : 140 I. C. 846 [This case went up on appeal to the Privy Council and has been reported in 60 I. A.

As to the discharge of Jury under S. 305 Cr. P. Code, *see* notes under heading "Discharge of Jury" in Ch. VIII *post*. As to the effect of discharge, *see* S. 308 Cr. P. Code.

10. Judge's discretion in discharging a Jury and choosing a new Jury, under the English Law.

In spite of the provisions contained in Ss. 282, 283 and 308 of the Code of Criminal Procedure, contentions are sometimes raised, based on English Law, that the trial before the new Jury chosen after the discharge of the old Jury is illegal, in as much as the old Jury having been duly empanelled and sworn could not have been discharged without sufficient cause, and that if the discharge has been irregular no other Jury can be empanelled to try the prisoner. It is necessary, therefore, to notice briefly the English Law on the subject.

The power of the Judge to discharge the Jury under the law in England was more or less a matter of practice which fluctuated at various times and which has been summed up in the elaborate judgment of Cockburn, C. J., in the case of *Charlotte Winsor v. The Queen* (1866) L. R. 1 Q. B. 289, at pp. 303-306. The old rule of practice "that a Jury once sworn and charged in a criminal case could not be discharged without giving a verdict" was departed from again and again.

The death of a juror (*R. V. Gould*, 3 Burn's Justice 30th. Ed. 98), the illness of a juror (*R. V. Scalbert*, 2 Leach 620), the misconduct of a juror in leaving the jury-box and also the Court without the Court's leave (*R. V. Ward*, 10 Cox. 573), the sudden illness of the prisoner (*R. Stevenson*, 2 Leach. 546), though the prisoner consented to trial going on in his absence (*R. V. Streek*, 2 C. & P. 413), the absence of a witness by accident (*R. v. Stokes* 6 C. & P. 157), have been held to be good and sufficient grounds warranting the discharge of a Jury. In *Reg. v. Davison* (1860) 8 Cox. 360, Pollock C. B., Martin B., and Hill J., in a case where a Jury had been discharged by a Judge of what was said was his own caprice, and not from any illness of any of the jurors or any real necessity having arisen and no reason for the discharge appearing on the record, it was held that the discharge did not bar a second trial.

The rule quoted above, in its broad form, received the approbation of the majority of the Court of Queen's Bench in Ireland in the case of *Conway and Lynch v. The Queen* (1845) 7 Ir. L. R. 149 : 1 Cox 210. The facts of that case were that in a trial for murder at the Spring Assizes of 1843, after the Jury had been sworn and the evidence had been closed, the Jury retired to deliberate and remained 24 hours without meat, drink, fire or other refreshment and they then returned into Court and declared that they had not agreed on their verdict and that they could not agree on it. The presiding Judge thereupon discharged the Jury without consent and without objection, and without any fatality having occurred. The

354 : 38 C. W. N. 11 : 58 C. L. J. 300 :
12 P. 811 : 35 Bom. L. R. 1087 : 65 M. L. J.
513 : 1933 A. L. J. 893 : 34 Cr. L. J. 843 : A.
I. R. 1933 P. C. 208 : 144 I. C. 911, where it

was held that the Juror whose competency is challenged may be examined either for or against the allegation].

judgment of the dissentient Judge Crampton J. was approved by the Court of Queen's Bench in England in *The Queen v. Charlesworth* (1861) 31 L. J. Rep. M. C. at p. 46 : 1 Best & Smith 460. There on a trial of an information by the Attorney-General for bribery, a material witness for the prosecution refused to answer a question put to him, and the Judge, holding that he was bound to answer it, adjudged him guilty of contempt, and thereupon and for no other reason, at the request of the Counsel for the prosecution, the defendant objecting, discharged the Jury. The course pursued in this case was questioned in the Court of Queen's Bench in England and although it was not necessary to give judgment upon its propriety, Blackburn, J. expressed an opinion that it was right, which opinion seems to have been shared by Cockburn, C. J. who denied that the rule laid down in Blackstone that "the Jury cannot be discharged, unless in cases of evident necessity till they had given their verdict" is a true or correct exposition of the law as practised then. Wightman and Crampton JJ. on the other hand thought that the discharge under the circumstance mentioned was improper. Wightman, J. Crampton, J. and Blackburn, J., however, were agreed that assuming that the discharge of the Jury was improper, the defendant was not entitled to judgment or to a stay of Jury process ; Cockburn, C. J. inclining to the same opinion, but holding that in a case of doubt the Court ought not to interfere.

In *Charlotte Winsor v. The Queen* (1866) L. R. 1 Q. B. 289 in a trial for felony, the Jury being unable to agree, the Judge discharged them and the prisoner was then given in charge of another Jury at the next assizes, and a verdict returned and judgment and sentence passed. On a Writ of Error it was held that the Judge had a discretion to discharge the Jury, which a Court of Error could not review ; that the discharge of the first Jury without a verdict was not equivalent to an acquittal and that a second Jury process might issue. The case was taken to the Court of Exchequer Chamber [(1866) L. R. 1 Q. B. 390] and the decision of the Queen's Bench was affirmed. The Judgment of the Court (Erle C. J., Pollock, C. B., Martin, Bramwell, and Piggott BB., and Byles and Montague Smith JJ.) was delivered by Erle C. J. The learned Chief Justice observed as follows :—"We think it unnecessary again to go through an examination of the authorities and arguments upon which the judgments in the cases referred to, were rested, all with one exception leading to the conclusion above stated. The exception is the decision in the case of *Conway and Lynch* (7 Ir. L. R. 149) where the judgment of the majority was adverse to that conclusion. But Crampton, J. dissented from the rest of the Court and gave a judgment, remarkable for sound reasoning and deep research, by which the propositions of law on which he relied appear to us to be clearly established. (See the Judgment of Crampton, J. which is also reported in the footnote to the case of the *Queen v. Charlesworth* (1861) 31 L. J. Rep. M. C. at p. 46). We consider that the doubts which have caused this repeated litigation originate in the unlimited terms used by Sir Edward Coke in stating what he considered to be the rule of the common law relating to the discharge of juries before verdict, viz, "a Jury sworn and charged in the case of life or member, can not be discharged by the Court or any other, but they ought to give their verdict" (Co. Litt. 227b). This rule, if taken literally, seems to command the confinement of the Jury till death if they do not agree, and to avoid any such consequence an exception was introduced

in practice which Blackstone has described by the words "except in case of evident necessity" (See 4 Bl. Com. 360). But the exception so expressed has given rise to further doubts, because necessity is an equivocal word, meaning either irresistible compulsion or high degree of need. Those who have been interested in objecting to a discharge of a Jury before verdict, have disputed whether the discharge was necessary in the stricter sense of the word. The same dispute about the meaning of the word necessity in the exception to the rule is the source of the main questions raised upon this writ of error, and they are in substance answered when we decide on the meaning of that word in the exception to this rule, and apply that meaning to the facts appearing on the record. We assume it to be clear that the discharge of the Jury before verdict may be lawful at sometime and under some circumstances. Then with reference to the facts on this record, we hold that the Judge at the first trial had by law power to discharge the Jury before verdict, when a high degree of need was made evident to his mind from the facts which he had ascertained. We cannot define the degree of need without some standard for comparison ; we cannot approach nearer to precision than by describing the degree as a high degree such as in the wider sense of the word might be denoted by necessity. We hold further that the Judge alone had to decide when the 'necessity' in this sense of the word for the discharge of the Jury was made evident to him, and his decision thereon is not made subject to review by any legal tribunal. It was his duty to exercise his discretion both in ascertaining the relevant facts and in determining their effect in making the necessity for the discharge evident to himself. The lawfulness of the discharge depended upon the result of this exercise of his discretion, and the statement of that result upon the record is, in our judgment, sufficient to establish that the order for the discharge in question was lawfully made, and that the subsequent proceedings to trial and conviction are not rendered erroneous thereby. If the discharge of the Jury was lawful, all the grounds of error founded on the assumption that it was unlawful fail. The contention that the prisoner has a right, after a trial has begun and he has been given in charge to the Jury, to demand that the trial should be continued till a verdict should be given, or, if that cannot be done, that he should be acquitted and discharged, cannot be maintained. There is no reason or authority for supporting such a contention ; the failure of some of the Jury to agree with the rest is distinct from a doubt entertained by the whole Jury. If the notion could prevail that the failure of the Jury to agree entitled the prisoner to an acquittal, it of course follows that any single Jurymen by refusing to agree could ensure an acquittal. Even if it was assumed, for the sake of argument, that the statement on the record led the Judges of the Court of Error to the opinion that the order for the discharge in question was an improper exercise of discretion on the part of the Judge who tried the case, still we should hold that such a discharge was no legal bar to a second trial either on the same or on a fresh indictment. The only pleas known to the law founded upon a former trial are pleas of a former conviction or a former acquittal for the same offence, but if the former trial has been abortive without a verdict, there has neither been a conviction nor an acquittal, and the plea could not be proved. That which would be a matter of plea to a fresh indictment would be ground of error upon a second trial upon the same indictment. As far as relates to the former abortive trial, nothing which then took place would be ground of error on the

second trial on the same indictment, unless it would have been a bar by way of plea to a new indictment for the same offence. All the authorities are concurrent to this effect with the single exception of the case of *Conway and Lynch v. Reg.* (7 Ir. L. Rep. 149), and we have before given our opinion on that case. On these grounds we decide that there is no error apparent on this record and the judgment of the Court below is affirmed."

The discretion exercised by the Judge when he discharges the Jury on the ground of necessity, of the existence of which necessity it is for him to determine, cannot be reviewed in any way, though it was intimated—though not judicially—that a Jury could not be discharged to allow the prosecution to present a stronger case in another trial [*Lewis* (1909) 78 L. J. (K. B.) 722 : 2 Cr. A. R. 180]. As regards the apprehension that Judges, if left to themselves, may act capriciously and against the prisoner's interest, reference may perhaps not inaptly be made to what has been said by two of the most eminent Judges that ever sat on the Bench. Cockburn, C. J. in the aforesaid case of *Charlotte Winsor v. The Queen*, (at p. 310) observed thus : "It is true, as the Judges of old felt, there are instances in which discretionary power might be grievously abused in times such as I trust this country will never see again ; but I do not believe that discretionary power ever could be or would be abused at the present day. At the same time, men are open to infirmities which attach to human nature. I agree that our rules are to be framed to keep the administration of justice beyond the possibility of corruption. On the other hand, if a rule is essential for the convenient working of the administration of justice, we must trust to the honesty of those to whom we commit that most important department of the State. We must resort to the means we have of punishing corruption and dishonesty, if we find it operating on the minds of our judicial officers. I cannot help thinking that this discretion is one of a very useful and satisfactory character. We must trust that it will never be abused, or, if unhappily it should be abused, we must trust to the power of parliament and the executive for punishing the Judge who would act so dishonestly and corruptly." Martin., B. in *Reg v. Davison* 8 Cox 368 said thus : "A Judge has a discretion in many things and those who appoint Judges ought to take care to appoint Judges on whose discretion reliance can be placed."

The principles underlying the decisions in the cases referred to above have been codified in Ss. 282, 283, 305 and 303 of our Code of Criminal Procedure. These provisions again are not exhaustive ; and in cases of misconduct on the part of a juror, it has been held, as has already been noticed, that there is an inherent power in the Judge to discharge the Jury. (*See notes under the previous heading*).

See further notes under S. 308 in Ch. VIII, post.

CHAPTER IV.

D—Choosing Assessors—SS. 284-285.

DD—Joint Trial—S. 285A.

S. 284. When the trial is to be held with the aid of assessors, not less than three and, if practicable, four shall be chosen from the persons summoned to act as such.

S. 284A. (1) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian British subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

(2) In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other an European British subject) or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.

S. 285 (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceedings shall be stayed and a new trial shall be held with the aid of fresh assessors.

S. 285 A. In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284 A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this Chapter.

List of Headings :—

1. Number of assessors.
2. Choosing of assessors.
3. Composition of assessors according to the nationality of the accused.
4. Procedure where an assessor is unable to attend (S. 285).
5. Where an European and an Indian are tried jointly (S. 285 A).

COMMENTARY.

1. Number of Assessors—

Trial with the aid of assessors can only take place in a Court of Session (S. 268). The number of assessors shall be three, and if practicable, four (S, 284). Previous to the amendment of the Section by Act XII of 1923, S. 15, the provision was "two or more shall be chosen, as the Judge thinks fit". The amendment makes it clear that the number shall be four, if practicable, but not more, and if four be not practicable, then three at least.

When four are not chosen, the reason for the impracticability should be explained in the order-sheet, but the trial with three is legal, though no such reasons are recorded.¹ The trial must be commenced with at least three assessors ; if it is commenced with less than three, then there is no trial and the wrong procedure cannot be cured by S. 537.² If after a proper commencement, some of the assessors be unable to attend and at least one remains, then the trial would be valid (S. 285), but if before the commencement of the trial, one of the minimum number chosen becomes ill and is exempted from attendance, or was so deaf³, or deaf and blind⁴ as to be incapable of understanding the proceedings, it was held that the Court was not legally constituted at the commencement of the trial, and so the trial was invalid. A trial in the Sessions Court "with the aid of assessors" does not begin with the reading of the charge, as the assessors are chosen under S. 272 of the Code, only if the accused does not plead to the charge or claims to be tried.⁵

2. Choosing of Assessors.—

The assessors shall be chosen from the persons summoned to act as such (S. 284). A list of persons liable to serve as jurors or assessors is prepared according to the provisions contained in Ss. 321-324. The Code does not make any provision for special assessors like special jurors. The mode of summoning assessors before the Court of Session is provided for in Ss. 326 and 327. The Section requires that the Judge must choose the assessor from the persons summoned ; he has no power to choose from persons otherwise present in Court.⁶ The constitution of the Court is illegal if only one assessor was duly summoned under S. 326, and the others were sent for at the trial.⁷ A case triable with the aid of assessors was being tried by a Jury ; subsequently, on the day when arguments were heard, the Judge, on the objection of the defence, found that the case was triable with the aid of assessors, and he directed that "the jurors would henceforth be considered as assessors." Arguments were then apparently heard, and the opinions of the gentlemen who had been empanelled as jurors were recorded as the opinions of the assessors. *Held*, that the trial was illegal as the gentlemen were not "summoned to act as assessors," but as jurors, and so the trial was not by a lawfully constituted tribunal.⁸

1. Jamal Momin (1924) 1925 P. 29 : 26 Cr. L. J. 713 : A. I. R. 1925 P. 381 : 86 I. C. 153.

2. Jairam Kunbi (1923) 20 N. L. R. 129 : 25 Cr. L. J. 459 : A. I. R. 1924 N. 287 : 77 I. C. 811 [following Jaisukh (1920) 43 A. 125 : 22 Cr. L. J. 127 : 59 I. C. 559 ; Jayram (1901) 25 B. 694 : 3 Bom. L. R. 274 ; Tirumal Reddi (1901) 24 M. 523] ; Ram Narain (1923) 26 Cr. L. J. 359 : A. I. R. 1925 O. 110 : 84 I. C. 711.

3. Babulal (1898) 21 A. 106 ; Bastiano (1890) 15 B. 514.

4. Tirumal Reddi (1901) 24 M. 523 : 2 Weir 340.

5. Bastiano (1890) 15 B. 514 ; Jayram (1901) 25 B. 694 : 3 Bom. L. R. 274.

6. Balak (1917) 19 Cr. L. J. 363 : 44 I. C. 587 ; Khub Singh (1910) 11 Cr. L. J. 724 (O) : 8 I. C. 874.

7. Badri (1894) A. W. N. 207 ; Man Singh (1913) 35 A. 570 : 14 Cr. L. J. 654 : 21 I. C. 894.

8. Sheopal (1933) 34 Cr. L. J. 1093 : A.I.R. 1333 O. 351 : 145 I. C. 803 [relying on Khub Singh (1910) 11 Cr. L. J. 724 (O) : 8 I. C. 874 ; referring to Mav Singh (1909) 35B. 423 : 10 Cr. L. J. 30 : 2 I. C. 48] ; Man Singh (1913) 35 A. 570 : 14 Cr. L. J. 654 : 21 I. C. 894]

The assessors are not chosen, as in the case of jurors, by lot. Their selection is left entirely to the Judge, and no party can challenge an assessor ; but proper objections should be considered by him.⁹ There is no reason why an objection of presumed or actual partiality could not be allowed, particularly when it is urged at the time of the selection of the assessors.¹⁰ Where one of the assessors expressed during the course of the trial that he was determined to help the accused : *held*, that he was not a proper person to act as an assessor and in such a case the High Court has power under S. 561-A to order a new trial with the help of new assessors.¹¹

The same assessors may aid in the trials of as many persons successively as the Court thinks fit. (S. 272)

For special provisions in regard to assessors where European British subjects are concerned, see S. 284 A and the note under the next heading.

3. Composition of Assessors according to the nationality of the accused :—

S. 284 A is a new Section and has been introduced by the Criminal Law Amendment Act XII of 1923, S. 16. Prior to the amendment, S. 450 (now repealed) laid down that where the accused was an European British subject, he could, in a trial with assessors, before the first assessor was appointed, claim to be tried by a mixed Jury, not less than half of the members of which should be Europeans or Americans or instead of claiming a mixed Jury, could require that not less than half the assessors should be Europeans or Americans, and if there were several Europeans jointly accused they could jointly require so. By this new Section, European and Indian British subjects are placed on the same footing. Either of them can now require that all the jurors must be of their race. The same privilege has been conferred on Europeans, who are not British subjects, and Americans.

As to the meaning of the expression, "Who has been found under the provisions of the Code to be European British subjects" &c., see notes under the heading "Composition of jurors according to the nationality of the accused" in the preceding Chapter.

S. 284 A must be read with Chapter XLIV-A. The Section has no connection with cases involving racial complexion falling under Chapter XXXIII. Those cases, where they are warrant cases, are ordinarily triable by Jury (S. 446 (2)), but there is a proviso to it in the following terms ;—

"Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of S. 284 A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians".

9. Moulvie Abdul (1881) 4 Shome 59, 67.

10. Shivadhin (1920) 22 Cr. L. J. 262 : A. I. R. 1923 P. 116 : 60 I. C. 662.

11. Lal Singh (1933) 15 L. 20 : 35 Cr. L. J. 107 : A. I. R. 1933 L. 926 : 146 I. C. 446.

Where the accused are not all of one nationality the provisions of S. 285A come into operation. See *post*.

4. Procedure where an Assessor is unable to attend—(S. 285)—

After the trial has commenced with the aid of the requisite number of assessors, if all but one assessor absent themselves or be unable to attend, the trial will still proceed with that one assessor and it will not be necessary to add a new assessor in place of the absent ones. The law contemplates the continuous attendance of one assessor at least throughout the trial. Where, therefore, during the course of the trial with three assessors, one assessor died at the early stage of the proceedings, later on another assessor became too ill to take any further part in the trial, and the third assessor was obliged to retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished; *held*, that the trial was before a Court without jurisdiction and a new trial must be had according to law.¹² If an assessor is absent during any part of the trial, he ceases to be an assessor and cannot afterwards act as such.¹³ Where it is discovered after the trial has begun that one of the assessors was interested or otherwise unfit to sit as an assessor (S. 556), the Sessions Judge should get the High Court to set aside the order by which the incompetent assessor was appointed and all the subsequent proceedings in the trial, whereafter he ought to choose another assessor and proceed with the trial *de novo*.¹⁴ Where one assessor was absent during the trial and afterwards resumed his place and delivered his opinion on the entire evidence, it was held by the majority of the Judges (Benson & Bhashyam Ayyangar, JJ.) that this was an irregularity which was not shown to have, in fact, occasioned a failure of justice and was therefore cured by S. 537.¹⁵ Davies, J. held *contra*, that the conviction was bad, as it had been obtained at a trial held with two assessors one of whom was not present during a part of the trial, and therefore it was not held by a competent Court. Where in a Sessions trial the Judge allowed one of the two assessors to absent himself for one of the days on which the trial proceeded, and to return on the following day, it was *held* that the procedure adopted by the Sessions Judge was contrary to the intention of this Section and S. 295, and the Judge ought either not to have given leave of absence, or should have adjourned till a day when both the assessors could attend.¹⁶ An assessor who is allowed under the provision of this Section to absent himself during a portion of the trial cannot be allowed to resume his function afterwards, the portion of the proceedings which had taken place during his absence being read over to him on his return. This procedure is not in accordance with law and is not contemplated by it. The trial should proceed with the aid of the other assessor or assessors. He should not be allowed to resume his seat at any time after he had once absented himself.¹⁷ Where in a trial for murder held with assessors the Court relied on a statement made by the deceased, and the evidence necessary to prove such statement was not recorded until the close of the trial and the discharge

12. Muhammad (1891) 13 A. 337.

13. Messeruddin (1902) 6 C. W. N. 715.

14. Thiagaraja (1911) 1912 M. W. N. 378 : 13 Cr. L. J. 473 : 15 I. C. 313.

15. Tirumal Reddi (1901) 24 M. 523.

16. Piso (1894) Rat. 695.

17. Ghasia Chamar (1894) 8 C. P. R. 9.

of the assessors : *held*, that this amounted to a material irregularity which was not cured by S. 537.¹⁸

As to the penalty of an assessor failing without lawful excuse to attend after an adjournment of the Court, see S. 332 Cr. P. Code.

5. Where an European and an Indian are tried jointly.—S. 285A.—

This new Section, inserted by S. 17 of Criminal Law Amendment Act XII of 1923, supplements Ss. 275 and 275A. If under these Sections a claim has been made by a person of one nationality, a person jointly accused, who is of a different nationality, may claim a separate trial.

18. Ram Lal (1893) 15 A. 136.

CHAPTER V.

E—Trial to Close of Case for Prosecution—Ss. 286-288.

S. 286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witnesses.

S. 287. The examination of the accused duly recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence.

S. 288. The evidence of a witness duly recorded in the presence of the accused under Chapter XVIII may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

List of Headings :—

1. Opening of the case for the prosecution (S. 286 (1))
2. Examination of the witnesses for the prosecution (S. 286 (2)).
3. Attendance of witnesses.
4. The order in which prosecution witnesses should be examined.
5. Is the prosecutor bound to call all the witnesses appearing in the Calendar as the witnesses for the Crown ?
6. Meaning of the expression "His witnesses."—Duty of the prosecution generally in respect of calling witnesses.
7. Persons whom the prosecution should examine.
8. Right to examine additional witnesses.
9. Court's duty in undefended cases.
10. Record of evidence.
11. The examination of the accused by or before the Committing Magistrate (S. 287).
12. The examination cannot be read as evidence unless it was duly recorded.
13. The examination shall be tendered and read as evidence.
14. Evidence of a witness at preliminary inquiry, admissible (S. 288).
15. Discretion of the presiding Judge.

COMMENTARY.

1. Opening of the Case for the Prosecution.—(286 (1))—

The first stage of the actual hearing of the case commences with the opening of the case for the prosecution by the prosecutor. For the definition of the Public Prosecutor, *see* S. 4 (t). The word "prosecutor" in S. 286 as well as in other Sections in this Chapter includes, besides Public Prosecutor, any person acting under the directions of the Public Prosecutor. As to the position, powers and duties of a Public Prosecutor, *see* notes under the heading "Public Prosecutor" in Chapter I, *ante*. S. 270 says, in every trial before a Court of Session, the prosecution shall be conducted by a Public Prosecutor. After the Jury have been sworn, the trial must proceed. An application for commission for the examination of a witness, made by the prosecution after the jurors were sworn, was refused on the ground that the

trial and the commission could not go together¹. A commitment cannot be quashed by the High Court under S. 215 after the accused pleads and is tried ; the case must then proceed under this Section or be withdrawn under S. 494. The dictum in *E. v. Shibo* (1881) 6C 584 that "the High Court can quash an illegal commitment at any stage of a criminal proceeding" has no application when the accused has been put on his trial and has pleaded to the charge.² Sessions cases should not be tried piece-meal. Before commencing a trial a Judge should satisfy himself that all necessary evidence is available. If it is not, he may postpone the case ; but once having commenced, he should, except for some very pressing reason to be recorded by him, proceed *de die en diem* till the trial is finished.³

The opening of the case consists in reading from the Penal Code or other law the description of the offence charged, and then stating shortly the nature of the evidence which would go to prove the guilt of the accused. If the accused has been charged with having been previously convicted so as to aggravate the substantive evidence charged, the part of the charge stating the previous conviction shall not be read out in Court, as directed by S. 286, until the Jury have delivered their verdict or the opinions of the assessors have been recorded (S. 310).

While stating shortly the evidence by which the prosecutor expects to prove the guilt of the accused, it would be improper for him to read out the confessions, if any, of the accused. The proper time for taking into consideration a retracted confession comes after the Court is in full possession of the entire prosecution evidence and can estimate what the effect of that evidence would be, considered apart from any statement which the accused person may from time to time have made.⁴ Opening for the prosecution ought to be confined to matters which are necessary to enable the Jury to follow the evidence when it is brought before them. This is not the stage at which doubtful questions of admissibility should be either raised or decided.⁵ Whether a statement or a document is admissible or inadmissible is a matter which should always be ruled upon at the time the document is being proved or put in or the question asked of the witness. In many cases a thing may be good evidence at one stage of the case, and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the Counsel for the prosecution does not afford a proper occasion for the determination of such question. If the prosecutor wishes to examine any witnesses, whom he proposes to call, but who have not already been examined under S. 208 or S. 219, he should, in fairness to the accused, state in his opening address the names of those witnesses and the purpose for which they are to be produced. The mere fact that the witness has not been examined before a Committing Magistrate is no ground for refusing to take the evidence of a relevant witness

1. Jacob (1891) 19 C. 113.
2. Arokia (1902) 2 Weir 262 ; Sagambur (1882) 12 C. L. R. 120 ; Haji (1900) 1 S. L. R. 6.
3. (1905) 8. Oudh Cas. 55.
4. Sukhia (1922) 20 A. L. J. 669 ; 24 Cr. L. J. 609 ; A. I. R. 1922 A. 266 ; 73 I. C. 497. See

Madodar (1921) 23 Cr. L. J. 141 ; A. I. R. 1923 P. 142 ; 65 I. C. 573.
5. Padam Prosad (1929) 33 C.W.N. 1121 (S. B.) : 50 C. L. J. 106 ; 30 Cr. L. J. 993 ; A. I. R. 1929 C. 617 ; 119 I. C. 193.

tendered by the prosecution.⁶ But the Allahabad High Court has held that the Public Prosecutor cannot demand, as of right, that any person shall be called as a witness who has not been examined by the Committing Magistrate either before commitment or under S. 219 after it, but the Court may call and examine such a witness if it considers it necessary in the ends of justice.⁷ A document cannot be read out as evidence unless already put in, or an express or implied undertaking is given to do so at the proper time. If Counsel in opening reads a document without objection, he impliedly undertakes to put it in at some time. If objection is taken, it cannot be read then.⁸

2. Examination of the Witnesses for the Prosecution—(S. 286(2))—

Sub-section (2) of S. 286 says that after opening his case, the prosecutor shall examine his witnesses. In the first place we have to see what is meant by the word "examination".

The examination of witnesses clearly means oral examination (except in cases where evidence is taken by commission, or in a case where a witness is deaf and dumb). It will be admitted that it is of the utmost importance that this should be followed in all cases where the witness is present to be examined. If a witness before the Magistrate gave a true statement he will probably, if intending to tell the truth, repeat the same statement without substantial difference at the trial. If, on the contrary, his statement before the Magistrate was not true in important particulars, he may not be able to repeat the same statement and may omit something important mentioned in his former evidence, or may deny on oral examination that he did make a particular statement before the Magistrate. The demeanour of the witness may be important for the Jury, assessor or Judge towards forming an opinion of his truth. Oral examination is, therefore, the general rule and is founded on reason and justice.⁹ Examination of a witness includes, besides examination-in-chief, his cross-examination by the adverse party and re-examination by the party calling him (S. 138 of the Evidence Act). The Evidence Act provides for a cross-examination as part of the record of evidence taken in a judicial proceeding.¹⁰ Upon the trial of a prisoner, it is illegal to read over to witnesses their depositions taken at a former trial and ask them if they are true; such witnesses will be held not to have been duly examined and a conviction founded upon their evidence will be quashed.¹¹ Such a question to a witness would amount to putting him a leading question and intimating to him impliedly that the same story is expected from him.¹² In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case were entirely new and the witnesses have not been examined before.¹³ Even if the reading of the deposition to the witnesses were done with the consent of the accused, it would be illegal, for, as their Lordships of the Privy Council said in *Attorney-General of New*

6. Khan Muhammad, 1 P. R. 1889.

7. Hayfield (1892) 14 A. 212.

8. Ibid. at p. 219.

9. Subba (1895) 2 M. 83.

10. Sagal Samba (1893) 21 C. 642; Mitrajit (1921) 22 Cr. L. J. 697; 1921 Pat. 7; 63 I. C. 825.

11. Kalundar (1870) 2 N. W. P. 100.

12. Rampieri (1891) 5. C. P. R. 33; Raghubar, Oudh Sess. Cas. No. 86.

13. Sheik Kyamut (1864) W. R. I (Gap No.); Kanye W. R. (1864) 38 (Gap No.); Mohun (1874) 22 W. R. 38.

South Wales v. Bertram (1867) 36 *Law Journal*, *Privy Council Cases*, 51, in a similar case, that a prisoner on his trial can consent to nothing. Their Lordships observed that the most careful notes often fail to convey the evidence fully in some of its most important elements, those for which the open oral examination of the witnesses in the presence of the prisoner, Judge and Jury is justly prized ; that it cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration ; that it cannot give the manner of the prisoner, when that has been important in the statement of anything of particular moment, nor could the Judge properly take upon himself to supply any of those defects which indeed will not necessarily be the same on both trials. They further said, "it is in short, or it may be, the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and the eye of those who receive it"¹⁴ It is wrong to suggest that S. 288 dispenses with such examination.¹⁵ It is the duty of a Judge to take care that the evidence in each case (where there are cross-cases) is complete in itself ; and no Judge has any right whatever to place before the Jury any evidence, save that which has been legally put in in the particular case which is under trial.¹⁶

The ordinary and proper and convenient way of recording evidence is to take it down in the first person, exactly as spoken by the witnesses.¹⁷ A witness should be examined orally in detail as to what he says he knows. It will be not only contrary to law but in violation of the first principles of evidence to allow a document alleged to contain a statement of what the witness knew to go into the record as evidence instead of examining in detail the witness orally.¹⁸

But though the reading over of previous depositions is illegal or irregular, the, High Court has not always set aside the conviction where the accused was not substantially prejudiced ; as where some further questions were put to the witnesses in a simple case ; or such procedure was adopted at the express request of the prisoner¹⁹ ; or by the consent of the Crown and defence pleaders²⁰ ; or without objection at the time, and the matters elicited in cross-examination were sufficient for the conviction²¹ ; or the deposition was read over to a witness only at the preliminary inquiry, but he was examined at the trial²² ; or though the deposition-in-chief of a doctor before the Magistrate was read over to him in the Sessions Court, he was

14. *Bishonath* (1869) 12 W. R. 3 ; *Lyme* (1923) 4 L. 382 : 25 Cr. L. J. 377 : A. I. R. 1924 L. 17 : 77 I. C. 425 ; *Akbar Molla* (1923) 51 C. 271, 278 : 38 C. L. J. 379 : 25 Cr. L. J. 773 : A. I. R. 1924 C. 449 : 81 I. C. 261 ; *Jethalal* (1905) 29 B. 449 : 2 Cr. L. J. 480 ; *In re Annavi Muthiriyar* (1915) 39 M. 449, 454 : 16 Cr. L. J. 294 : 28 I. C. 518 ; *Umar Hajee* (1922) 46 M. 117 : 23 Cr. L. J. 748 : A. I. R. 1923 M. 32 : 69 I. C. 636.

15. *Subba* (1895) 9 M. 83 ; *Majohur* (1875) 24 W. R. 11. See also *Radhy* (1864) 1 W.R. 14 ; *Raj-Krishna* (1868) 1 B. L. R. O. Cr. 37.

16. *Zoolfkar Khan* (1871) 16 W. R. 36.

17. *Ibid.*

18. *Lal Singh* (1925) 5 L. 396 : 27 Cr. L. J. 170 : A. I. R. 1925 L. 19 : 91 I. C. 954.

19. *Radhy* (1864) 1 W.R. 14 ; *Purmessur. v. Soroop* (1870) 13 W. R. 40 [not followed in *Upendra* (1906) 12 C. W. N. 140].

20. *Harjivan* (1925) 50 B. 174, 175 : 27 Cr. L. J. 1335 : A. I. R. 1926 B. 231 : 98 I. C. 407 [following *Ghanasham* (1906) 8 Bom. L. R. 538 : 4 Cr. L. J. 89].

21. *Nand Ram* (1887) 9 A. 609.

22. *Sadoo* (1874) Rat. 84, 87.

cross-examined there.²³ The view expressed in *Purmessur v. Soroop* (1870) 13 W. R. 40 has not been followed in *Upendra v. E.* (1906) 12 C. W. N. 140 which lays down that "except where the law expressly permits waiver, the right of an accused person should not be held to be lost by his consent to a procedure or to the admission of evidence which the law does not authorise". See also the Privy Council case cited above.

3. Attendance of Witnesses.—

All witnesses returned in the Calendar as witnesses for the prosecution are, whether they are called or not by the Crown, bound to be in attendance until the conclusion of the trial, unless they are released from attendance by order of the Court ; and before releasing them from attendance, the Court should satisfy itself that their evidence will not be required either by the prosecution or by the defence.²⁴ Where a Judge, after having examined five out of seven witnesses examined by the Committing Magistrate and bound over to give evidence at the trial, asked the Jury whether they wished to hear any more evidence, and, on their stating that they did not believe the evidence and wished to stop the case, recorded a verdict of acquittal : *Held*, that the procedure of the Judge was illegal, and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at by the Judge or the Jury until the whole evidence had been considered.²⁵

4. The Order in which Prosecution Witnesses should be examined.—

It is competent to a Sessions Judge to suggest to the prosecutor that it would be convenient if a particular witness were called at an earlier or later stage of the trial, but it is not within his province to refuse to allow the prosecutor to call his witnesses in the order he chooses.²⁶ It is an unsatisfactory feature of a criminal trial that an approver should be examined last, after all the witnesses who are supposed to corroborate his statement have been examined ; the corroborative evidence in such a case cannot be appreciated properly, nor can the Counsel properly question the witnesses.²⁷ In a capital case, it is important that the more important of the witnesses should be examined in such a way as would enable the Court to properly appreciate their evidence. The evidence should be led in sufficient detail and with due regard to the sequence of events, the facts which the witnesses saw or the acts which they did and also the reason which actuated them to do the acts being narrated in an intelligent fashion. And it is only by this means that a clear and consistent account of the whole thing may be presented before the Judge and the Jury.²⁸ If the Public Prosecutor and the Pleader for the accused cannot or will not prove thoroughly into the evidence which is being given so that an intelligent story can be included in the deposition, it is the duty of the

23. *Shamlal* (1924) 26 Cr. L. J. 572 : A. I. R. 1925 C. 980 : 85 I. C. 716.

24. *Durga* (1893) 16 A. 84 (F. B.) : 14 A.W.N. 7.

25. *Ramalingam* (1896) 20 M. 445 : 2 Weir 384.

26. (1905) 8 Oudh Cas. 55 ; *Per* Garth C. J. in

Ashootosh (1878) 4 C. 483 (F. B.) : 3 C. L. R. 270.

27. *Ali Mohammad* (1933) 36 Cr. L. J. 491 : A. I. R. 1934 L. 171 : 154 I. C. 224.

28. *Rafiqueuddin* (1934) 62 C. 572 : 39 C. W. N. 368 : 36 Cr. L. J. 808 : A. I. R. 1935 C. 184 : 155 I. C. 687.

Judge to do it, instead of leaving bits of evidence, in the air, so to speak, so that the High Court cannot make out from the record what it was that the witness was intending to say.²⁹ The prosecuting Inspector, the Government Pleader in the trial Court and the trial Judge do not, any of them, discharge their duty, if they are merely content with getting recorded and recording such evidence as the Police may put before the Court. It is the duty of all of them to apply some intelligence, all the intelligence they can, to the problems that arise in the case and towards securing all possible evidence on material points. They must examine the motives and relations between the parties and insist upon their actions, where those actions are material, being disclosed.³⁰ During trials, Sessions Judges rely far too much on a badly instructed Government Pleader or on the evidence of the prosecution shaping itself as best it may. It is much to be desired that a Sessions Judge should start his interest in a case at the very beginning of the trial and not when the time comes to write or dictate the judgment. First of all, the ingredients of an offence ought to be clearly grasped and then attempts made continuously to discover whether the evidence of the complainant and of the prosecution witnesses did satisfy the ingredients or not. When a consideration of the facts of the case and of their applicability to a particular Section of the law are left to the end, a trial is bound to suffer and often a decision is arrived at in conflict with law.³¹

5. Is the Prosecutor bound to call all the witnesses appearing in the Calendar as the witnesses for the Crown.—

It is not at all a rule of law that the prosecution party must summon everybody who has seen the occurrence.³² It is entirely within the discretion of the Public Prosecutor conducting the case for the Crown to call or not to call any such witness or witnesses at a Sessions trial. It cannot be the duty of a Public Prosecutor acting on behalf of the Government and the country to call or put into the witness-box for cross-examination a witness whom he believes to be false or an unnecessary witness. In cases in which a prisoner is undefended, the presiding Judge should look at the deposition of any witness appearing in the Calendar as a witness for the Crown and not called on behalf of the Crown or tendered for cross-examination, in order to ascertain whether he should not himself take action under S. 540 of the Cr. P. Code.³³

The Public Prosecutor is not bound to call a witness whom he considers to be false or unnecessary, specially where such witness was called at the former trial by the Court and not as a witness for the Crown.³⁴ Where a prosecution witness was mentioned in the First Information Report and examined in the Committing Magistrate's Court but

29. Molla Khan (1933) 37 C. W. N. 1061 : 35 Cr. L. J. 601 : A. I. R. 1934 C. 169 : 148 I. C. 172.

30. Karan Singh (1927) 26 A. L. J. 92 : 29 Cr. L. J. 26 : A. I. R. 1928 A. 25 : 106 I. C. 442.

31. Suraj Prasad (1930) 32 Cr. L. J. 158 : A. I. R. 1930 A. 534 : 128 I. C. 601.

32. Parbhu Dusadh (1926) 28 Cr. L. J. 868 : A. I. R. 1928 P. 46 : 104 I. C. 708.

33. Durga (1893) 16 A. 84 (F. B.) : 14 A. W. N. 7. *See also* Balaram (1921) 49 C. 358 : 24 Cr. L. J. 221 : A. I. R. 1922 C. 382 : 71 I. C. 685 ; Barindra (1909) 37 C. 467 : 14 C. W. N. 1114, 1207 ; 11 Cr. L. J. 453 : 71 C. 359 ; Ibrahim (1934) 36 Cr. L. J. 348 : A. I. R. 1934 P. 95 : 153 I. C. 466.

34. Reed (1921) 49 C. 277 : 23 Cr. L. J. 742 : A. I. R. 1922 C. 461 : 69 I. C. 630. *See also* In

was omitted in the Sessions Court on the ground that he was hostile and the defence did not examine him even though the witness was present in Court : *held*, that the Public Prosecutor was not bound to produce any witness who was "according to his case" not expected to give true evidence.³⁵ The Sessions Judge cannot compel the prosecution to examine such a witness as a Crown witness or to tender him for cross-examination. If the Sessions Judge thinks such witness to be a material one he should be examined as a Court witness. It is also open to the Sessions Judge to draw any adverse inference against the Crown in not calling such a witness in the Sessions trial.³⁶ The above cases modify to some extent the views expressed in some of the earlier cases. As for instance, *Field, J.* held³⁷, that it was not a valid ground for non-production of a witness in the Sessions Court, that he was examined by the Committing Magistrate against the express wish of the police officer in charge of the prosecution, and that in conducting a case for the prosecution, all persons who are alleged or known to have knowledge of the facts ought to be brought before the Court and examined, and the Judge and the assessors or the Jury should have an opportunity of forming their own judgment as to their credibility or otherwise. The decision of *Trevelyan, J.* in *E. v. Kaliprososno*³⁸, seems to suggest the proper course to be taken in such cases. What the learned Judge says is this : "In a case in which there is a matter necessitating enquiry, or there is a question to be cleared up, and the witness proposed to be called is one upon whose testimony the Court could place confidence, I think I should call him. But I certainly should not call any witness on whose evidence I could not place reliance, at any rate in a case in which the prisoner is defended by Counsel * * * I do not think that the prosecution is bound to tender him for cross-examination, or do more than have him present in Court for the accused to call him or not, as they may think fit". It should be noted that there is no provision in the Code entitling a prisoner to have a witness for prosecution, who is not called, to be put into the witness-box for cross-examination, but that is the practice of the Courts in England and it should be followed here.³⁹ Where 7 out of 10 witnesses examined in the Committing Magistrate's Court were not examined and it was not suggested that the witnesses were discarded as they were untruthful, the accused was entitled to have them put in the box for cross-examination and so he was prejudiced on that not being done.⁴⁰ When a witness was not tendered for cross-examination, the accused could have applied to have the witness examined under the present S. 291 of the Code, or might comment on the circumstance of his not being examined or tendered for cross-examination.⁴¹

re *Muthaya Thevan* (1926) 28 Cr. L. J. 307 : A. I. R. 1927 M. 475 : 100 I. C. 531.

35. *Amar Singh* (1929) 31 Cr. L. J. 176 : A. I. R. 1930 L. 82 : 120 I. C. 674 [referring to *Narain Das* (1922) 3 L. 144 : 23 Cr. L. J. 513 : A. I. R. 1922 L. 1 : 68 I. C. 113.]

36. *Dulo* (1934) 36 Cr. L. J. 869 : A. I. R. 1935 S. 60 : 155 I. C. 1114.

37. *Ram Sahai* (1884) 10 C. 1070. See also *Eruva Perayya* (1889) 2 Weir 379 ; *Dhamba* (1891) Rat. 581.

38. *Kaliprasanno* (1886) 14 C. 245.

39. *Fattechand* (1868) 5 Bom. H. C. R. 85.

40. *Nagendra* (1923) 27 C. W. N. 820 : 38 C. L. J. 203 : 25 Cr. L. J. 190 : A. I. R. 1923 C. 717 : 76 I. C. 430.

41. *Fattechand* (1868) 5 Bom. H. C. R. 85 at p. 96. See also *Dhunno Kazi* (1881) 8 C. 121, 124, 125 ; *Ram Ranjan* (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554, *Brahmadeo* (1919) 1920 Pat. 24, 29, 31 : 21 Cr. L. J. 33 : 54 I. C. 241 ; See also *Evidence Act* S. 114. Ill. (g).

And where such a witness is examined under S. 291, the Counsel for the defence is not entitled to commence his examination by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition are under the circumstances only admissible by way of cross-examination, with the premission of the Court, if the witness proved himself a hostile witness.⁴² Similarly, the police are not bound to send up a witness whose evidence they believe to be false or unnecessary.⁴³

The doctrine that the Crown is not bound to call witnesses on whom it does not rely, must not be pressed too far. It is its clear duty to produce all persons who lay claim to have first-hand knowledge of the incidents under trial ; and if the prosecution do not choose to place them in the witness-box, it must at least tender them to the defence for cross-examination. The Crown is not so much concerned to prove a particular offence as to acquaint the Court with all the relevant evidence, and it is for the Court to determine how much of that evidence is to be credited and what inference it warrants.⁴⁴ The fact that the prosecution believed that some persons who were present at a search, had formed an opinion unfavourable to the prosecution story regarding it, is no reason why those persons should not be called by the prosecution in as much as what those persons would be required to state in their depositions was what they observed and not what they thought. The prosecution is in duty bound to call such witnesses, unless it is of opinion that they would misrepresent facts and would misstate what happened.⁴⁵ Therefore, it is the duty of the prosecution to put all evidence before the Court, and the only valid excuse for not examining persons who were present on the spot and could have given important evidence would be that no reliance could be placed on their evidence.⁴⁶ Another excuse may be that the witnesses were unnecessary, as for instance where a number of witnesses have already been called to prove a particular fact.⁴⁷ But in a murder case all witnesses who are alleged or are known to have knowledge of the facts ought to be brought before the Court and examined, and where any witness known to the prosecution is able to swear to facts material to the case, the proper procedure to follow is to get him to give evidence even though other witnesses might have spoken to the same facts.⁴⁸ Where a prosecution witness is not called as being unreliable, it is usual to tender such witness for cross-examination ; the defence is also entitled to claim the privilege and if it omits to do so it cannot afterwards make a capital of the fact that those witnesses were not cross-examined.⁴⁹ It is not obligatory on the prosecution to examine an accused as a witness in the Sessions Court, after he has forfeited his pardon.⁵⁰

42. Zavar (1897) 20 A 155 : 17 A. W. N 229.

43. Ramjit Ahir (1922) 2 P. 309 : 24 Cr. L. J. 801 : A. I. R. 1923 P. 413 : 74 I. C. 705.

44. Jumo (1909) 3 S. L. R. 200 : 11 Cr. L. J. 410 : 6 I. C. 847. See also Dhunno Kazi (1881) 8 C. 121 ; Ram Sahai (1884) 10 C. 1070.

45. Munui Sonar (1904) 9 C. W. N. 433 : 2 Cr. L. J. 176.

46. Muhammad Yunus (1922) 50 C. 318, 326 : 25 Cr. L. J. 467 : A. I. R. 1923 C. 517 : 77 I. C. 819.

47. Doraiswami (1923) 45 M. L. J. 845 : 25 Cr. L. J. 75 : A. I. R. 1924 M. 239 : 75 I. C. 987.

48. In re Veera Karavan (1929) 53 M. 69 : 31 Cr. L. J. 1006 : A. I. R. 1929 M. 906 : 126 I. C. 488.

49. Nayan Mandal (1929) 34 C. W. N. 170 : 31 Cr. L. J. 918 : A. I. R. 1930 C. 134 : 125 I. C. 746.

50. Nayeb Shahana (1934) 61 C. 399 : 38 C. W. N. 659 : 35 Cr. L. J. 1479 : A. I. R. 1934 C. 635 : 152 I. C. 44.

6. Meaning of the expression "His witnesses." -Duty of the prosecution generally in respect of calling witnesses.—

"His witnesses" evidently means, with reference to his opening according to the provisions of Sub-s. (1) of S. 286, those witnesses who will give the evidence by which he expects to prove the guilt of the accused. "His witnesses" will not, therefore, include those witnesses who will not support the case for the prosecution, or help to support it. Before the prosecution launches any case they ought to be satisfied of the truth of the case they are going to place before the Court. Consequently, it is absurd to expect the prosecution to call a witness who will speak against that case. If the prosecution find that a number of those who are present will not support the prosecution case, they must make up their minds whether they are truthful witnesses or not. If they come to the conclusion that they are truthful witnesses, they ought to withdraw the prosecution forthwith. If, on the other hand, they come to the conclusion that they are not truthful witnesses, there is no obligation for the prosecution to call them. Practically speaking, therefore, the prosecution ought to call those witnesses who, they think, will support the prosecution case and no others. If the witnesses who are prepared to speak against that case are respectable witnesses who ought to be believed, then the prosecution ought to withdraw the case. It is quite useless to pursue a case and then call a whole series of witnesses who are going to speak against it. On the other hand, if the defence comes to the conclusion that the witnesses are witnesses of truth who ought to have been called, then it is the duty of the defence to call them. On the mere fact that the prosecution does not call certain witnesses the Court need not draw the presumption under S. 114 ill (g), Evidence Act. It cannot be said because certain witnesses have not been called that the Judge is not exercising his discretion judicially, because he refuses to draw the presumption.⁵¹ Witnesses who will deliberately conceal the truth or deliberately distort facts should not be called, though they might have been examined in the Court of the Committing Magistrate (See the cases cited under the preceding heading). But there may be witnesses whose respective versions of the facts material to the case might not be quite consistent with each other; but where there is no ground for believing that any of them is a false witness, they should all be examined, if it appears to the prosecution that on sifting their evidence a *prima facie* case might be made out. The Public Prosecutor does not represent the aggrieved party or the police, but the Crown. If there be no sufficient evidence, he may withdraw the prosecution. At the same time, he is not the Judge and he cannot give the accused the benefit of his doubt about his guilt. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not according to the tastes of any one else.⁵² Subject, therefore, to the exceptional cases cited under the preceding heading, the Public Prosecutor is bound to call all material

51. Bhuban (1933) 60 C. 1361 : 37 C. W. N. 1098 : 35 Cr. L. J. 33 : A. I. R. 1933 C 600 : 146 I. C. 378.

52. Ram Ranjan (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554 ; Amritlal

(1915) 42 C. 957 : 19 C. W. N. 676 : 21 C. L. J. 331 : 16 Cr. L. J. 497 ; 29 I. C. 513 ; Nga Lu (1933) 6 R. 254 : 35 Cr. L. J. 792 : A. I. R. 1933 R. 378 : 148 I. C. 810.

witnesses. Unless all the material witnesses are called, the defence is deprived of the opportunities of eliciting from the absent witnesses facts that may discredit the prosecution case, and if the failure to examine any of them is shown to have prejudiced the accused, the Court may direct a retrial.⁵³ See Notes under heading "Duties of a Public Prosecutor" in Chapter 1, *ante*.

Therefore, the Public Prosecutor cannot suppress the evidence of a reliable witness simply because he does not support his or the police's particular theory of the crime.⁵⁴ The mere fact of a witness being summoned or brought into Court by the defence⁵⁵, or being a relation of the accused⁵⁶, is not necessarily a sufficient reason for the prosecutor not calling him. In capital cases all available eye-witnesses should be called, though they have given different accounts.⁵⁷ The practice of merely tendering important eye-witnesses cited by the prosecution for cross-examination is not a practice which should be encouraged, especially in a murder case, as it would be very unfair to the accused.⁵⁸ The fact that a serious charge has been made against the witness by the accused is not a good ground for not examining him.⁵⁹ It is not the duty of the Public Prosecutor to call only those witnesses who speak in his favour.⁶⁰ He should not keep back a witness merely because his evidence may weaken the case for the prosecution⁶¹, or be somewhat favourable to the accused.⁶² He must call all those alleged or known to have information or able to throw light on the case⁶³, or who took part in the transaction charged just before or after the occurrence.⁶⁴ But where a case is adequately proved against the accused, the mere fact that the Public Prosecutor omitted to call other witnesses who were named in the information to the police and who were examined by the police, is not material, as the Public Prosecutor is not bound to

53. Saroj Kumar (1932) 59 C. 1361 : 55 C. L. J. 439 : 33 Cr. L. J. 854 : A. I. R. 1932 C. 474 : 139 I. C. 873.

54. Rarjit Ahir (1922) 2 P. 309, 315 : 24 Cr. L. J. 801 : A. I. R. 1923 P. 413 : 74 I. C. 705 ; Kunja Subudhi (1928) 8 P. 289 : 30 Cr. L. J. 675 : A. I. R. 1929 P. 275 : 116 I. C. 770 ; Shukul (1933) 55 A. 379 : 34 Cr. L. J. 689 : A. I. R. 1933 A. 314 : 144 I. C. 267.

55. Dhunno Kizi (1881) 8 C. 121, 125 ; Ram Ranjan (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554.

56. Bankhandi (1892) 15 A. 6 : 12 A. W. N. 114.

57. Ram Ranjan (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554 ; Dhamba (1891) Rat 581 ; Mathura (1929) 8 P. 625 : 30 Cr. L. J. 1136 : A. I. R. 1929 P. 343 : 120 I. C. 37 (in which Ram Ranjan (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554, has been referred to) ; Lachhminarain (1932) 33 Cr. L. J. 497 : A. I. R. 1932 L. 500 : 137 I. C. 691 ; In re Veera Karavan

(1929) 53 M. 69 : 31 Cr. L. J. 1006 : A. I. R. 1929 M. 906 : 126 I. C. 488.

58. In re Veera Karavan (1929) 53 M. 69 : 31 Cr. L. J. 1006 : A. I. R. 1929 M. 906 : 126 I. C. 488.

59. Madhub Chunder (1873) 21 W. R. 13, 16.

60. Ram Ranjan (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554 ; Barindra (1909) 37 C. 467 : 14 C. W. N. 1114 : 11 Cr. L. J. 453 : 7 I. C. 359.

61. Kashinath (1871) 8 Bom. H. C. R. 126, 153 ; Munui Sonar (1904) 9 C. W. N. 438 : 2 Cr. L. J. 176.

62. Durga (1893) 16 A. 84, 87 (F. B.) : 14 A. W. N. 7.

63. Nagendra (1915) 19 C. W. N. 923 : 21 C. L. J. 395 : 16 Cr. L. J. 576 : 30 I. C. 128 ; Nagaratna (1931) M. W. N. 727.

64. Muhammad Yunus (1922) 50 C. 318, 326, 327 : 25 Cr. L. J. 467 : A. I. R. 1923 C. 517 : 77 I. C. 819.

call any person whose evidence, in his opinion, is unnecessary.⁶⁵ There is no such general rule that every eye-witness ought to be called by the prosecution. The duty of the prosecution is not to endeavour to obtain a conviction at any cost, but to see that the facts are fairly presented before the Court. But *prima facie* it is for the prosecution to call such witnesses as they think will establish their case. If that has been done, no point can be made for the defence out of the fact that one more available eye-witness was not called.⁶⁶ The mere numerical strength of the witnesses cannot be taken as establishing beyond doubt the fact to be proved.⁶⁷ Where, however, after the examination of some of the witnesses, the Judge asked the Jury whether they wished to hear any more evidence, and they stated that they did not believe the evidence and wished to stop the case, and the Judge recorded a verdict of acquittal, it was held, that the procedure was wrong and that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to have been arrived at until all the remaining witnesses had been examined.⁶⁸ Where the Judge refused to examine 11 out of 17 witnesses produced on behalf of the prosecution, it was *held* on appeal by the Government that it was such an irregularity as was likely to have caused a failure of justice and it was therefore necessary that further proceedings more regularly conducted should be taken.⁶⁹ The Judge cannot desist from taking the rest of the prosecution case on an admission by the defence pleader.⁷⁰ The prosecution must succeed on the strength of its own case and not on the weakness of the defence.⁷¹ The prosecution cannot derive merit from the failure of the defence to cross-examine the witnesses or even to take part in the proceedings.⁷² If a witness is called for the prosecution and subsequently cross-examined as hostile, his evidence should not on that account be left out of account. His with the rest of the evidence should go to the Jury to decide what it was worth.⁷³

In a very recent case of the Rangoon High Court, *Hpa Wa* (1935) 37 Cr. L. J. 234 : A. I. R. 1935 R. 506 : 160 I. C. 113 the following propositions have been laid down :—

There is no provision of law which requires the Crown to cite for the prosecution every witness who professes to know something about the case. The Crown has to establish certain facts and naturally should call those witnesses whose evidence 'if believed will establish those facts, and certainly should not call those witnesses whose evidence it has reason to believe will not establish those facts ; such witnesses are best examined by the defence, and the Court can then decide between the two sets of evidence given, each at its proper time. The Crown cannot be accused of unfairness if it declines to call, as its own witnesses, witnesses

65. Doraiswami (1923) 45 M. L. J. 846 : 25 Cr. L. J. 75 : A. I. R. 1924 M. 239 : 75 I. C. 987.

66. Vasudeo Balwant (1932) 56 B. 434 : 33 Cr. L. J. 613 : A. I. R. 1932 B. 279 : 138 I. C. 503 ; Bhuban (1933) 60 C. 1361 : 37 C. W. N. 1 98 : 35 Cr. L. J. 33 : A. I. R. 1933 C. 600 : 146 I. C. 378.

67. Brahmdeo (1919) 1920 P. 24 : 21 Cr. L. J. 33 : 54 I. C. 241.

68. Ramalingam (1896) 20 M. 445 : 2 Weir 384.

69. Nathua (1836) 6 A. W. N. 68.

70. Sangaya (1900) 2 Bom L. R. 751.

71. Venkatasubba (1931) 54 M. 931 : 33 Cr. L. J. 51 : A. I. R. 1931 M. 689 : 134 I. C. 1143.

72. Mela Ram (1930) 32 Cr. L. J. 1233 : A. I. R. 1931 L. 361 : 134 I. C. 782.

73. Wahid Ali (1931) 36 C. W. N. 356 : 33 Cr. L. J. 604 : A. I. R. 1932 C. 523 : 138 I. C. 373.

cited for the defence. Every witness, whether for the prosecution or the defence, must be examined in such a way that the Court may best satisfy itself as to his credibility or non-credibility; and it is obvious that a witness will be heard at his best if he is examined by the party who relies on his evidence, and cross-examined by the party against whom he is giving evidence. It can only confuse the Court to have witnesses included in the prosecution whose evidence is inconsistent with the case which the prosecution seeks to establish.

7. Persons whom the Prosecution should examine.—

(1) The person who gave the First Information to the Police, whether it was recorded by the Police as such or not. If the prosecution does not examine him, he should be tendered for cross-examination.⁷⁴ First Information Report is not substantive evidence⁷⁵, and, if belated, has little evidentiary value⁷⁶, unless the delay has been satisfactorily explained.⁷⁷ It may be used to corroborate or contradict the evidence of the person who gave it.⁷⁸ Where the report is made after considerable deliberation, after omitting some names, the accused whose names are omitted, if not properly identified, are entitled to the benefit of doubt.⁷⁹ Omission of the name of the accused in the report made by a person does not entitle that accused to an acquittal, unless the person professes himself to be an eye-witness or is personally injured.⁸⁰

The First Information Report does not prove itself and has to be tendered under one or other provision of the Evidence Act. Such a report, if it contains a dying declaration, is admissible under S. 32 (1) of that Act. It is also admissible as one of the *res gestae*, and in this sense it is as valuable to the accused as to the prosecution.⁸¹

(2) The persons who related the occurrence to the First Informant⁸², and the eye-witnesses. The mere fact that an eye-witness does not come forward immediately as investigation is begun is not by itself in this country necessarily a sufficient ground for rejecting his testimony.⁸³ Where witnesses named in the First Information Report were not called and no explanation worth the name is given for the omission to call them: *held*, that the omission must tell very heavily on the prosecution case.⁸⁴

74. Chandrika (1922) 1 P. 401, 403 : 24 Cr. L. J. 129 : A. I. R. 1922 P. 535 : 71 I. C. 353.

75. Ibrahim (1927) 8 L. 605 : 28 Cr. L. J. 983 : A. I. R. 1928 L. 17 : 105 I. C. 807 ; Jamaluddin (1923) 24 Cr. L. J. 812 : A. I. R. 1924 A. 164 : 74 I. C. 716 ; Abdul Aziz (1934) 33 N. L. R. 262 : 35 Cr. L. J. 957 : A. I. R. 1934 N. 94 : 144 I. C. 447.

76. Jalal (1925) 8 L. L. J. 183 : 27 Cr. L. J. 821 : 95 I. C. 597.

77. Ibrahim (1927) 8 L. 605 : 28 Cr. L. J. 983 : A. I. R. 1928 L. 17 : 105 I. C. 807.

78. Jamaluddin (1923) 24 Cr. L. J. 812 : A. I. R. 1924 A. 164 : 74 I. C. 716 ; Thakar Singh (1927) 29 Cr. L. J. 277 : 107 I. C. 761 ; Abdul Aziz (1934) 30 N. L. R. 262 : 35 Cr. L. J. 957 : A. I. R. 1934 N. 94 : 149 I. C. 447.

79. Khizar (1922) 4 L. L. J. 322 : 25 Cr. L. J. 533 : A. I. R. 1922 L. 410 : 77 I. C. 997.

80. Bahaduri (1926) 28 Cr. L. J. 45 : A. I. R. 1927 L. 63 : 99 I. C. 77 ; Attar Khan (1921) A. I. R. 1922 L. 28.

81. Gajjan Singh (1930) 33 Cr. L. J. 183 : A. I. R. 1931 L. 103 : 135 I. C. 668 [following Azimaddy (1926) 54 C 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227] ; Mahla Singh (1930) 32 Cr. L. J. 522 : A. I. R. 1931 L. 38 : 130 I. C. 410.

82. Ram Sahai (1884) 10 C 1070.

83. Miran (1931) 32 Cr. L. J. 1032 : A. I. R. 1931 L. 529 : 133 I. C. 446.

84. Debendra (1934) 35 Cr. L. J. 904 : A. I. R. 1934 C 458 : 149 I. C. 139.

(3) The Investigating Police officer, to prove the circumstances of the arrest and detention of the accomplices when the possibility of collusion arises.⁸⁵ In all important cases and especially in cases of murder and dacoity, the Police officer making the investigation should be examined as a witness regarding the circumstances of the investigation. It is generally important to the trying authority to know why, where and when the accused persons were arrested. It is often important to ascertain what the witnesses said when they were first questioned by the Police, and whether such statements agree with those subsequently made by the witnesses in Court.⁸⁶ Where, however, after the examination of the Head constable, the Sessions Judge considers that the evidence of the Inspector of Police is necessary, he should intimate his opinion to the Public Prosecutor and give him an opportunity of calling him, before making a remark upon his absence while charging the Jury.⁸⁷ Where the accused pleads 'not guilty' in the Sessions Court after having admitted his guilt before the Committing Magistrate, it is incumbent on the trial Court to enquire very carefully into the Police investigation and the whole of the circumstances under which the confession of guilt now retracted was obtained.⁸⁸

(4) Search witnesses should be called, even if the prosecution believed that they had formed an opinion unfavourable to the prosecution story regarding it, in as much as what those persons would be required to state is what they observed and not what they thought. The prosecution, however, is not bound to call them, if it is of opinion that they would misrepresent facts and would mis-state what happened.⁸⁹ The search lists and the search witnesses should invariably be produced by the prosecution and they would be guilty of suppressing material evidence if they did not produce the same ; but the prosecution can prove the recovery of the incriminating articles by other evidence as well, and the Court has to form an opinion of its own from all these evidences, regarding the truth of the Crown case.⁹⁰ In a case where there are several search lists, in each of which several items of property are mentioned, the prosecution ought to prove their case with regard to the different items severally, and the different items of property or different groups thereof mentioned in a search-list ought to be separately and consecutively numbered, either by letters or figures or by some other distinguishing marks, and the same numbering should be followed while recording the evidence of witnesses relating to the searches to which those search-lists refer. If this procedure is adopted there will be no difficulty on the part of the Court in appreciating the evidence that is adduced in respect of the searches.⁹¹

(5) Persons named by the accused as the real offenders should be called to exclude the hypothesis of the guilt of others than the accused.⁹² It is the duty of the prosecution to call

85. Bhagya (1895) Rat. 750, 751.

86. Rampuri (1881) Rat. 173.

87. Raman (1897) 21 M. 83 : 2 Weir 503.

88. Sukhia (1922) 20 A. L. J. 669 : 24 Cr. L. J. 609 : A. I. R. 1922 A 266 : 73 I. C. 497.

89. Munui Sonar (1904) 9 C. W. N. 438 : 2 Cr. L. J. 176 ; Rampuri (1881) Rat. 173.

90. Muhammad Bashir (1931) 1932 A. L. J. 104 : 33 Cr. L. J. 943 : A. I. R. 1932 A. 158 : 140 I. C. 246.

91. Rafiqueuddin (1934). 62 C 572 (S. B.) : 39 C. W. N. 368 : 36 Cr. L. J. 808 : A. I. R. 1935 C 184 : 155 I. C. 687.

92. Kangal (1905) 41 C. 601, 616 : 15 Cr. L. J. 713 : 26 I. C. 161.

every witness who can throw any light on the enquiry whether he supports the prosecution theory or the defence theory, but it is not the duty of the prosecution to meet a definite defence set up by the accused such as 'private defence' or '*alibi*,' the onus of proving which is on the latter.⁹³

(6) Persons who can prove the 'dying declaration'. It is a material piece of evidence, and even though it may be in favour of the defence, it is the duty of the Public Prosecutor, according to the remarks of Wilson, J. in *E. v. Dhunno Kazi* (8 C. 121), to place it before the Court at the trial.⁹⁴

(7) Finger-print expert, to prove the identity of the accused. It can not be laid down as a rule of law that it is unsafe to have a conviction on the uncorroborated testimony of a finger-print expert; the true rule seems to be one of caution, that is to say, that the Court must not take the expert opinion for granted, but it must examine his evidence in order to satisfy itself that there can be no mistake, and the responsibility is all the greater when there is no other evidence to corroborate the expert. (See the case-law discussed).⁹⁵ S. 73 of the Evidence Act which says that the Court may direct any person present in Court to write must mean that where the accused is in Court the Judge presiding in that Court may then and there ask him to write something for the purpose of enabling the Court to compare his writing with some other writing; and that the procedure of delegating to another Magistrate, not sitting as a Court, to take such a writing from the accused person when he is not in Court nor standing his trial does not come within the provision of the Section. The question of reliability of expert evidence is one for the Jury to decide.⁹⁶

(8) Medical evidence and evidence of *post-mortem* examination. It is the bounden duty of a Public Prosecutor to tender in evidence not only the medical evidence and the post-mortem report of the Civil Surgeon who performed the post-mortem examination on the body of the deceased, but also the report of the Chemical Examiner and of the Imperial Serologist.⁹⁷ See Ss. 509 & 510 Cr. P. C. It is not enough for the Chemical Examiner merely to state his opinion; he must state the grounds on which he arrives at that opinion. As the Chemical Examiner merely tenders a report and he does not appear and give evidence, it is extremely desirable that his report should be full and complete and take the place of evidence which he would give if he were called as a witness.⁹⁸ Report of the Chemical Examiner is, however, not a sufficient basis for capital punishment where the Chemical Examiner is not called as a witness and opportunity is not given to the accused to cross-examine him.⁹⁹ Medical evidence can only be used as corroborative of the charge and

93. *Brahamdeo* (1919) 21 Cr. L. J. 33 : 1920 P. 24 : 54 I. C. 241.

94. *Sagal* (1893) 21 C. 642.

95. *Harendra* (1931) 35 C. W. N. 853 : 54 C.L.J. 107 : 32 Cr. L. J. 1001 : A. I. R. 1931 C. 441 : 133 I. C. 111.

96. *Kishori Kishore* (1935) 39 C. W. N. 986 : 36

Cr. L. J. 921 : A. I. R. 1935 C 308 : 156 I. C. 396.

97. *Ghirrao* (1933) 10 O. W. N. 1108 : 34 Cr. L. J. 1009 : A. I. R. 1933 O. 265 : 145 I. C. 470.

98. *Gajrani* (1933) 1933 A. L. J. 1617 : 34 Cr. L. J. 754 : A. I. R. 1933 A. 394 : 144 I. C. 357.

99. *Happu* (1933) 1934 A. L. J. 173 : 35 Cr. L. J. 280 : A. I. R. 1933A 837 : 146 I. C. 1089.

not as the evidence of the charge.¹⁰⁰ Omission to call medical witness before the Jury is improper ; mere putting in of doctor's statement before the Committing Magistrate when such statement is apparently against the prosecution case is not prudent.¹⁰¹

8. Right to examine additional witnesses.—

It is the intention of the Code, so far as can be gathered from its provisions, that an accused should not be put on his trial until all the evidence that was forthcoming and of the existence of which the Crown might reasonably be supposed to be aware, has been put in record and in his presence, if possible ; and further it is provided that, if the accused so require, a copy of all such evidence so recorded be given to him before his trial commences. Where, therefore, a witness was not examined as a witness by the Committing Magistrate or was not examined by the Crown under the supplementary provisions of S. 219 of the Code, he cannot be examined as a matter of right by the Crown. The Court may, however, call and examine such a witness if it considers necessary in the interests of justice.¹⁰² The prosecution is bound to supply the defence with a copy of the statement of a witness who has not been examined before the Committing Magistrate and whom the prosecution proposes to examine for the first time in the Sessions Court. The prosecuting Counsel should always in his opening mention the names of these new witnesses and the purpose for which they are being called and the Court should always insist on this being done. Nothing should be done by the prosecution which would in any way prejudice the defence, embarrass the accused or take him by surprise. The practice under which the Public Prosecutor used to send copies of the statements of the new witnesses to the Clerk of the Crown for submitting them to the presiding Judge, along with other papers, approved.¹⁰³ But the Chief Court of Punjab has held that there is nothing in the Code which restricts the prosecution at a Sessions trial to witnesses who have been examined in the Court of the Committing Magistrate.¹⁰⁴

9. Court's duty in undefended cases.—

When the accused is unrepresented it is peculiarly the duty of the Court of trial to protect his interest.¹⁰⁵ The Court should assist an undefended prisoner in putting questions by way of cross-examination.¹⁰⁶ There has been a practice long established and recognized that when the accused appears before the Judge on a capital charge, the Judge is accustomed to request a member of the bar who practises before him to undertake the defence of the accused ; that obligation has always been recognised by the profession who always have willingly undertaken the defence

100. *Din Muhammad* (1934) 35 Cr. L. J. 963 : A. I. R. 1934 Pesh 21 : 148 I. C. 1078.

101. *Debendra* (1929) 56C. 566 : 33 C. W. N. 632 : 50 C. L. J. 1 : 30 Cr. L. J. 1031 : A. I. R. 1929 C. 244 : 119 I. C. 378.

102. *Hayfield* (1892) 14A. 212 : 12 A. W. N. 63.

103. *Dhondiba* (1934) 36 Bom. L. R. 950 : 36 Cr. L. J. 344 : A. I. R. 1934 B. 487 : 153 I. C. 278.

104. *Khan Muhammad*. I. P. R. 1889.

105. *Doubleday* (1917) 12 Cr. A. R. 240.

106. *Barker* (1927) 20 Cr. A. R. 70.

of the accused so charged.¹⁰⁷ The Crown now makes arrangements for the defence of undefended prisoners awaiting trial on capital charges, in all Courts, original as well as appellate.

10. Record of evidence.—

The manner of recording evidence in trials before the Sessions Court has been prescribed in Ss. 356, 357, 359 and 360 of the Code.

In S. 356 a new clause has been added by Act XVIII of 1923, S.96, and numbered as Sub-s. (2A) which provides that when the evidence of a witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand or cause it to be taken down in that language in his presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

The English practice in such circumstances has been laid down thus :—

Where a foreigner who is ignorant of the English language is on trial on an indictment for a criminal offence and is not defended by Counsel, the evidence given at the trial must be translated to him, and compliance with this rule cannot be waived by the prisoner. If he is defended by Counsel, the evidence must be translated to him unless he or his Counsel expresses a wish to dispense with the translation and the Judge thinks fit to permit the omission, but the Judge should not permit it unless he is of opinion that the accused substantially understands the nature of the evidence which is going to be given against him.¹⁰⁸

The Sessions Judge shall also record such remarks (if any) as he thinks material, respecting the demeanour of a witness whilst under examination (S. 363). A person, who is a material witness for the prosecution in a Sessions trial, should not be allowed to act as interpreter.¹⁰⁹

As regards High Courts established by Royal Charter and the Chief Courts of Oudh and Sindh, they shall, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before those Courts, and the evidence shall be taken down in accordance with such rule (S. 365).

All witnesses shall be examined on oath or affirmation in the form prescribed by the High Court.—Indian Oaths Act X of 1873, S. 5.

Under S. 166 of the Evidence Act, jurors or assessors may put any question to the

107. Mohar Ali (1915) 19 C. W. N. 556 : 21 C. L. J. 495 : 16 Cr. L. J. 481 : 29 I. C. 321.

109. Ah Soi (1926) 53. C. 659 : 30 C. W. N. 696 : 27 Cr. L. J. 805 : A. I. R. 1926 C. 922 : 95 I. C. 469.

108. Lee Kun (1916) I. K. B. 337. C. A.

witnesses through or by leave of the Judge which the Judge himself might put and which he considers proper.

Under S. 353 Cr. P. C., except as otherwise expressly provided, all evidence shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader. For good reason a Judge may order the removal of the accused out of sight, though not out of the hearing, of a witness giving evidence.¹¹⁰

11. The Examination of the Accused by or before the Committing Magistrate (S. 287).—

After the prosecutor has examined all his witnesses (S. 286), he shall tender the aforesaid examination and read it as evidence (S. 287). This Section speaks only of the examination by or before the Committing Magistrate. This is done under S. 209 of the Code. That Section says that when the Magistrate holding the inquiry has taken all such evidence as may be produced by the prosecution or on behalf of the defence, and "he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him," the Magistrate shall, if he finds that there are not sufficient grounds for committing the accused, record his reasons and discharge him. And S. 210 says, "When upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his name declaring with what offence the accused is charged." So far as the aforesaid provisions go, they do not make it imperative on a Magistrate to examine an accused person at any stage of the inquiry before committing him to stand his trial at the Court of Session. But the language of S. 287, where the words 'if any' do not occur after the word 'examination', would go to show that there must have been an examination of the accused by the Committing Magistrate before the order of commitment was drawn up. Further, S. 342 declares that the Magistrate may question the accused at any stage of the inquiry without previously warning him, but only for the purpose of enabling him to explain any circumstances appearing in evidence against him and adds, "and (the Magistrate) *shall*, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called upon for his defence". Now S. 342 applies to the examination of the accused under Chapter XVIII as well as under Chapters XX to XXIII.¹¹¹ And, as in an inquiry under Ch. XVIII the accused is not called upon for his defence, it has been held in some cases that the examination of the accused by the Committing Magistrate is not obligatory though his examination after the close of the prosecution case is desirable.¹¹² On the other hand, it has been held in some other cases that the examination of the accused is obligatory on the part of the Committing

110. *Smellia* (1919) 14 Cr. A. R. 128.

111. *Bechu Lal* (1926) 54 C. 286, 295, 296 : 45 C. L. J. 8 : 28 Cr. L. J. 297 : A. I. R. 1927 C. 250 : 100 I. C. 377.

112. *Bachu Lal* (1926) 54 C. 286, 293, 294 : 45 C. L. J. 8 : 28 Cr. L. J. 297 : A. I. R.

1927 C. 250 : 100 I. C. 377 ; *Ponnusamy. v. Ramasamy* (1923) 46 M. 758 (F. B.) : 24 Cr. L. J. 833 : A. I. R. 1924 M. 15 : 74 I. C. 945 ; *Dinu* (1921) 16 S. L. R. 201 : 26 Cr. L. J. 191 : 83 I. C. 895.

Magistrate,¹¹³ even though the accused stated that he wanted to reserve his statement before the Sessions Court and refused to answer the Magistrate's question.¹¹⁴ It has been further held that the Magistrate has no discretion then, and if he makes an order of commitment without such examination, the order will be irregular, though the irregularity would not vitiate the commitment unless it has occasioned a failure of justice.¹¹⁵ If the accused before the Committing Magistrate says that he does not wish to make a statement and afterwards sends in a statement and asks to have it put on the record, it is admissible under S. 287.¹¹⁶ In this connection the provisions of Sub-sec. (2) of S. 342, should be noted. It says :—

“S. 342 (2)—The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just”.

It should be noted that the discretion given by law is not to be used for the purpose of driving the accused to make statements incriminating himself ; but only for the purpose of ascertaining from the accused how he is able to meet facts standing in evidence against him, so that these facts should not stand against him unexplained.¹¹⁷ It is improper for the Court to cross-examine him.¹¹⁸ The object of the examination is not to supplement the case for the prosecution against him or to show that he is guilty.¹¹⁹ Where the accused was induced by the police to make a confession of having taken part in the commission of an offence and the Committing Magistrate admitted it in evidence and examined the accused with reference to it and the accused admitted it, it was held that the accused being examined about a confession which was not admissible in evidence, the questions and the answers to them could not be said to be duly recorded and were therefore legally inadmissible in evidence under S. 287.¹²⁰ See further Notes on S. 342 given under heading, “*Examination of the accused*,” in the next Chapter.

From the use of the words “by or before the Committing Magistrate,” S. 287 would not apply to a statement or confession recorded under S. 164 in the course of the Police investigation by any Magistrate and forwarded by him to the inquiring Magistrate. But such statement or confession would nevertheless be evidence, if put in, under S. 80 of the Evidence Act. The words “Committing Magistrate” mean the Magistrate who held the inquiry on the proceeding on which the commitment was made. So, where the Magistrate who held the inquiry passed an order of discharge and a superior Court under S. 437 ordered a commit-

113. Pandara (1900) 23 M. 636 : 2 Weir 253 ; Ahmadi (1898) 20 A. 264, 265 : 18 A. W. N. 52.

114. Ahmadi (1898) 20 A. 264 : 18 A. W. N. 52.

115. Pandara (1900) 23 M. 636 : 2 Weir 253.

116. Chidambaram (1908) 32 M. 3, 13, 15 : 9 Cr. L. J. 108 : 11 C. 22.

117. Chinibash (1878) 1 C. L. R. 436 ; Behari (1880) 6 C. L. R. 431 ; Hossein Buksh (1880) 6 C. 96 : 6 C. L. R. 521 ; Bhairab (1898) 2 C. W.

N. 702 ; Bhut Nath (1902) 7 C. W. N. 345 ; Hargobind (1892) 14 A. 242 : 12 A. W. N. 83 ; Ex-parte Virabhadra (1863) 1 M. H. C. R. 199.

118. Hurry Churn (1883) 10 C. 140 : 13 C. L. R. 358.

119. Rangi (1886) 10 M. 295 : 2 Weir 361.

120. Gaung Gyi (1908) 4 L. B. R. 244 : 14 Bur L. R. 233 : 8 Cr. L. J. 62.

ment, it was held that S. 287 was not inoperative.¹²¹ Statements recorded before transfer by the predecessor of the Committing Magistrate can be rightly admitted under S. 287.¹²²

12. The Examination cannot be read as evidence unless it was duly recorded.—

S. 364 says that whenever the accused is examined by any Magistrate the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full in the language in which he is examined, or, if that is not practicable, in the language of the Court, or in English; and such record shall be shown or read to him or be interpreted to him, and the accused shall be at liberty to explain or add to his answers. Such record shall then be signed by the accused and the Magistrate, and the Magistrate shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused. If the record does not comply with the above particulars, then the examination of the accused cannot be put in under S. 287 of the Code.¹²³ A remedy, however, has been provided by S. 533 of the Code, which says that if it is found that the provisions of S. 364 were not fully complied with by the Magistrate recording the examination, the Court before which it is tendered shall take evidence that such person duly made the statement recorded; and notwithstanding anything contained in the Indian Evidence Act S. 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

But though a remedy is thus provided against a failure of justice arising from the carelessness of the Magistrate in complying strictly with the provisions of S. 364, it occasionally happens that it leads the Court which has this evidence before it, either on the trial, or on appeal, or in revision, to regard it in an unfavourable light to the prosecution, and, in spite of evidence taken under S. 533 to correct an error, it is sometimes inclined to refuse to attach the weight to such evidence which, if the statement had been "duly recorded", it would have been entitled to receive. The necessity, moreover, for thus correcting the inexcusable carelessness of the Magistrate by taking evidence under S. 533 causes delay in the trial and waste of time as well as expense in obtaining such evidence. Too much stress cannot, therefore, be attached to the careful observance of their duties by Magistrates in recording such statements or confessions.

Where the accused was questioned with reference to a piece of evidence against him, not legally admissible, and he answers in support of that evidence, *held*, that the questions and answers could not be said to be "duly recorded" and were, therefore, legally inadmissible in evidence under S. 287.¹²⁴

When the accused, in reply to the Committing Magistrate, made a statement confessing

121. *Malinga* (1907) 31 M. 40 : 7 Cr. L. J. 29.

122. *Ghulam* (1925) 7 L. 70 : 27 Cr. L. J. 627 ;
A. I. R. 1926 L. 271 : 94 I. C. 403.

123. *Kalla Lakhmaji* (1886) 2 Bom. H. C. R. 395 ;
Petumber (1870) 14 W. R. 10.

See Chapter VI, post.

124. *Gaung Gyi* (1908) 4 L. B. R. 244 : 14 Bur.
L. R. 233 : 8 Cr. L. J. 62.

his guilt but not intending it to be recorded, the whole statement including his statement that he did not want it to be recorded should be recorded.¹²⁵

13. The Examination shall be tendered and read as evidence.—

To give in evidence a document, three formalities are required : (1) tendering it as evidence, (2) scrutiny thereof by the Judge and (3) reading the same as evidence. These formalities, though not very important, are still essential to justice. They should be complied with before the document could be taken into consideration (*see* M. H. C. Pro. 14th Nov. 1886). The scrutiny by the Judge may be necessary for there may be interlineations, alterations or erasures on other unusual circumstances which may call for explanation from the Committing Magistrate, whom it would be necessary to examine, in spite of his certificate.¹²⁶

It is not optional with the prosecution to tender it ; it is bound to do so whether it tells for or against the prisoner.¹²⁷ It should be read as a part of the prosecution case, and before the defence is entered upon, marked and a note thereof made.¹²⁸

The statements made by the accused in answer to questions put by the Committing Magistrate to explain any circumstances appearing in evidence against him, may amount to a confession of guilt, or may amount only to a statement of the defence. Even if it amounts to a confession of guilt, the Judge need not ask the accused if he objects to the reception of his confession ; it must be put in.¹²⁹ Where a confession made before a Magistrate is on the face of it a confession which fulfils the requirements of the law, it is immaterial that such confession has been retracted before the Sessions Judge. Such a confession must be presumed to be genuine unless and until proof, or at least a reasonable probability, of the existence of some invalidating cause, is shown.¹³⁰ If there are no grounds for questioning the statement on examination, either as regards the manner of recording it, or as to the facts stated in it, the prisoner can be convicted on that statement without other corroborative evidence.¹³¹

A question may arise, whether a statement amounting to a confession made by the accused and caused by inducement, threat or promise proceeding from the Committing Magistrate, is to be governed by S. 287 of the Code or S. 24 of the Evidence Act. If it is to be governed by S. 287 it will be admissible in evidence ; if by S. 24, it will be inadmissible. Such a question arose in a Bombay case.¹³² It was not decided as it was not necessary for the decision of that case, but the Court pointed out some difficulty in re-

125. Vasudeo Balwant (1932) 56 B. 434 : 33 Cr. L. J. 613 : A. I. R. 1932 B. 279 : 138 I. C. 503.

126. *See* Nelson's Cr. P. Code, 1872, P. 246,

127. Sheik Meher (1870) 13 W.R. 63 ; Rama Tevan (1892) 15 M. 352 : 2 Weir 394. *See also* Vijiram (1892) 16 B. 414, 423.

128. High Court Proceedings dated 31st March 1869. No. 623.—2 Weir 361.

129. Misser Sheikh (1870) 14 W. R. 9. *But See* Fatu Santal (1921) 6 P. L. J. 147 : 22 Cr. L. J. 417 : 61 I. C. 705.

130. Binda (1890) 10 A. W. N. 173.

131. Runjeet (1866) 6 W. R. 73.

132. Fakira Appaya (1915) 40 B. 220 : 17 Cr. L. J. 133 : 33 I. C. 309.

conciling the two provisions. If the words "duly recorded" be taken to mean "recorded in such a manner as not to be rendered inadmissible by Ss. 24, 25 or 26 of the Evidence Act or by S. 364 of the Cr. P. Code"¹³³, the two provisions might be reconciled. It should be noted that S. 287 has not been made expressly subject to the provisions of the Evidence Act, as has been done in S. 288 under the recent amendments.

Sub-sec (3) of S. 342 says: "The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed." But they are not admissible in evidence against a co-accused either under S. 10 or under S. 30 of the Evidence Act.¹³⁴ Sub-s. (4) says,—"No oath shall be administered to the accused".

The statement, so far as it relates to a previous conviction, must not be put in ¹³⁵ (Sec. 310).

A confession made by a prisoner in the course of the examination, incriminating himself as well as other persons tried jointly with him, may be taken into consideration by the Court against the other persons as well as against the person making it (S. 30 of the Evidence Act). But the statement must be taken in its entirety,¹³⁶ and the confession must be sufficient to implicate the person making it before it can be taken into consideration against another person.¹³⁷ A mere inculpatory admission which falls short of being an admission of guilt does not amount to a confession within the meaning of the Evidence Act.¹³⁸ But a prisoner who pleads guilty at the trial and is thereupon convicted, cannot be said to be jointly tried with the other prisoners, committed on the same charge, who plead not guilty; the confession of the former is not, therefore, admissible in evidence against the others.¹³⁹ (See Notes under heading "Plea of guilty" in Ch. II, *ante*). Though the confession of a co-accused is evidence against the other accused, it can only be used in corroboration of other independent evidence; it cannot by itself be the basis of the conviction of the other accused.¹⁴⁰

133. *Bai Ratan* (1873) 10 Bom. H. C. R. 166.

134. *Kunwar* (1932) 8. Luck 286; 9 O. W. N. 1136; 34 Cr. J. 124; A. I. R. 1933 O. 86; 141 I. C. 192. [following *Abani Bhushan* (1911) 38 C 169; 15 C. W. N. 25; 11 Cr. L. J. 710; 8 I. C. 770; *Mahadeo* (1923) 45 A. 323; 25 Cr. L. J. 305; A. I. R. 1923 A. 322; 76 I. C. 1025; *Govinda Naidu* (1928) 1929 M. W. N. 391; 30 Cr. L. J. 932; A. I. R. 1929 M. 285; 118 I. C. 512.]

135. *Teka Ahir* (1920) 5 P. L. J. 706; 22 Cr. L. J. 219; 60 I. C. 331.

136. *Greedhary* (1867) 7 W. R. 39; *Kisto* (1867) 7 W. R. 8; *Sneik Boodhoo* (1867) 8 W. R. 38; 5 M. H. C. R. App. IV,—High Court Proceedings, 11th Nov. 1869.

137. *Belat Ali* (1873) 19 W. R. 67; 10 B. L. R. 453; *Baijoo* (1876) 25 W. R. 43; *Chunder* (1875) 24 W. R. 42; *Noor Bux* (1880) 6 C. 279; 7 C. L. R. 385; *Ganraj* (1879) 2 A. 444; *Daji Narsu* (1882) 6 B. 288.

138. *Jagrup* (1885) 7 A. 646; 5 A. W. N. 131.

139. *Kalu Patil* (1874) 11. Bom. H. C. R. 146.

140. *Ashootosh* (1878) 4 C. 483 (F. B.); 3 C. L. R. 270.

14. Evidence of a witness at preliminary inquiry, admissible (S. 288).—

In order to admit as evidence in the trial, the deposition of a witness given in the preliminary inquiry under Chap. XVIII, the following CONDITIONS are necessary :—

(1) The deposition must have been duly recorded in the presence of the accused under Ch. XVIII ; and (2) the witness must have been produced and examined at the trial before the Sessions Court. Still the Judge has a discretion in the matter ; and if he allows the evidence to be admitted, then it may be treated as evidence for all purposes, subject to the provisions of the Evidence Act.

(1) The words "duly recorded in the presence of the accused under Ch. XVIII" have been substituted for the words "duly taken in the presence of the accused before the Committing Magistrate", by S. 78 of Act XVIII of 1923. To attract the operation of S. 288 Cr. P. C. it is necessary that the witness should have been examined before the Committing Magistrate. In a Full Bench decision of the Allahabad High Court [*Ashgar* (1935) 37 Cr. L. J. 337 : A. I. R. 1936 A. 134 : 1935 A. L. J. 1321 : 160 I. C. 1856] it has been laid down that a Magistrate, who, under Ch. XVIII, Cr. P. C., is inquiring into a case triable by the Court of Session or High Court, and to whom, before the prosecution evidence is closed, it appears that the case is one which ought to be tried by the Court of Session or High Court, is not empowered under S. 347 Cr. P. C. (subject to the production of defence witnesses under S. 212), to commit the accused for such trial without completing the rest of the prosecution evidence, and he is bound to record the rest of the evidence for the prosecution under S. 208 Cr. P. C., and then commit. The evidence duly recorded under Ch. XVIII would include not only the evidence recorded by the Committing Magistrate himself but also the evidence of supplementary witnesses examined under S. 219 and recorded by some other competent Magistrate, and by the amendment, the latter evidence has also been made admissible, if taken in the presence of the accused.¹⁴¹ It does not matter whether the order of commitment was made by the Magistrate who recorded the evidence, or by his successor in office under S. 350, or by the revisional authority under S. 437.¹⁴² The evidence will be admissible under S. 288. Statement to a Magistrate not empowered to commit,¹⁴³ and depositions taken under S. 164¹⁴⁴ are not admissible under S. 288. Where the Magistrate was holding a trial and examined witnesses but afterwards decided to commit the case for trial before the Sessions, it was held that the evidence was taken under Chap. XVIII.¹⁴⁵

S. 288 does not provide that the Judge may treat the evidence before the Magistrate of *all* the witnesses for the prosecution as evidence, if all the witnesses are produced and examined. If such was the intention of the Legislature, different language would have been

141. Abdul Gani (1925) 53C. 181 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537.

142. Malinga (1907) 31 M. 40, 42 : 7 Cr. L. J. 29.

143. Nana Raju (1889) Rat. 468, 470.

144. Ramdin (1894) Rat. 728.

145. Abdul Gani (1925) 53 C. 181, 186 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537.

used. The language is "the evidence of a witness" and no doubt this language would justify a Judge in a proper case in exercising his discretion in respect of any witness or witnesses. It does not contemplate a complete change of the course and practice of law specially laid down in S. 286 Sub-s. (2).¹⁴⁶

"Duly recorded" means recorded in the manner required by the provisions of law as contained in the Evidence Act as well as contained in Ch. XXV, which deals with the mode of taking and recording evidence in inquiries and trials (See Ss. 353, 356, 357, 360). The previous words were "duly taken", and under them it was held that when a deposition was taken without any cross-examination by the accused being allowed, such a deposition was improperly treated as evidence in the Sessions Court as it had not been "duly taken" in the presence of the accused within the meaning of S. 288¹⁴⁷. And under the present wording also, it has been held that where the witnesses were examined-in-chief at the hospital and the accused, who was then well enough to cross-examine, was given but refused the opportunity to do so at the time and they were cross-examined a week later, the statements were duly recorded.¹⁴⁸ A statement is admissible if the cross-examination was not prevented by the Courts' action,¹⁴⁹ as when it was voluntarily reserved,¹⁵⁰ or the pleader was refused audience, but the accused was not prevented from cross-examining personally.¹⁵¹ It is a clear right of the parties to cross-examine prosecution witnesses before the Committing Court makes up its mind as to whether there is a case to be committed. Where a prosecution started first of all as an ordinary warrant case but the Magistrate made up his mind, in view of the suggestion that there was a case exclusively triable by the Court of Session, to deal with the case from the beginning as though it were to end in a commitment and allowed the defence to reserve cross-examination; and later on, he committed the case to the High Court Session rejecting an application made by the accused to allow them to cross-examine; it being found that the reserving of the cross-examination only meant that the Counsel would have an opportunity of cross-examining later on, it was held that the Magistrate acted illegally in not giving the accused an opportunity to cross-examine the witnesses and to adduce evidence in defence.¹⁵² It should be noted that S. 288 has been expressly made subject to the provisions of the Evidence Act.

It has been held that S. 360, requiring the evidence to be read over to the witness in the presence of the accused, is mandatory and not directory, and the omission to conform to the law in this respect may render the evidence inadmissible both against the accused as

146. Subba (1885) 9 M. 83 : 2 Weir 356.

147. Sagal Samba (1893) 21 C. 642 (distinguished in Phanindra (1908) 36 C. 48 : 12 C. W. N. 1314 : 8 Cr. L.J. 221).

148. Muhammad Aslam (1926) 9 L. L. J. 45 : 28 Cr. L. J. 33 : A. I. R. 1926 L. 590 : 99 I. C. 65.

149. Gansa (1923) 2 P. 517 : 24 Cr. L. J. 641 : A. I. R. 1923 P. 550 : 73 I. C. 561.

150. Doraisami (1901) 24 M. 414 : 2 Weir 377 ; Raman (1929) 57 C. 44 : 33 C. W. N. 535 : 30 Cr. L. J. 1107 : A. I. R. 1929 C. 593 : 119 I. C. 808.

151. In re Dham Mundul (1883) 6 C. L. R. 53.

152. Nanoram (1929) 57 C. 945 : 32 Cr. L. J. 182 : A. I. R. 1930 C. 754 : 128 I. C. 802.

well as against the witness himself, if he is prosecuted for giving false evidence.¹⁵³ But the Privy Council has recently held that non-compliance with S. 360 is an irregularity and does not vitiate the trial in the absence of a failure of justice.¹⁵⁴ But the question whether the deposition would be admissible under S. 288 was not before the Privy Council and so was not decided.

Next, the deposition sought to be put in must have been taken in the presence of the accused.¹⁵⁵ Where a previous statement of the witness in another case against a different person in which the present accused was named, was put to the witness and referred to in the course of the evidence that he gave before the Committing Magistrate, that statement could not properly go in and be used as independent evidence establishing the guilt or innocence of the accused, though it could be used for the purpose of contradicting the statement made by the witness in the trial, under S. 145 of the Evidence Act.¹⁵⁶ If the previous statement is incorporated in the evidence given before the Committing Magistrate on the witness admitting his former statement as true, it might possibly be admissible under S. 288.¹⁵⁷ To be admissible under S. 80 of the Evidence Act the certificate must state that the deposition was duly taken in the accused's presence and not merely that "it was read over and admitted correct".¹⁵⁸ Deposition of a medical witness, not certified as above, is not admissible under S. 288.¹⁵⁹

Evidence not taken in the presence of the accused may be admissible under other special provisions of law, but not under S. 288 of the Code. As to the other provisions in this Code, *see* : S. 512.—Record of evidence in the absence of the accused ; Chap. XL. (evidence taken on Commission) ; or S. 509.—Deposition of medical witness taken on commission. *See also* S. 9 of the Bengal Criminal Law Amendment Act, 1925.

(2) The second condition is that the witness must not only be produced but examined in the trial. S. 288 does not apply if the witness was not produced at all¹⁶⁰, or was only tendered for cross-examination¹⁶¹, or only cross-examined. Unless the witness was first examined in the ordinary way, there was no room for exercising any discretion.¹⁶²

153. *See* Jyotish (1909) 36 C. 955 : 14 C. W. N. 82 : 10 Cr. L. J. 581 : 4 I. C. 416 ; Kamatchi (1904) 28 M. 308 : 2 Cr. L. J. 756 ; Mohendra (1906) 12 C. W. N. 845 : 8 Cr. L. J. 116 ; Rakhal (1909) 36 C. 808 : 13 C. W. N. 942 : 9 C. L. J. 690 : 10 Cr. L. J. 150 : 2 I. C. 697.
154. Abdul Rahaman (1926) 54 I. A. 96 : 31 C. W. N. 271 (P. C.) : 45 C. L. J. 441 : 1927 M. W. N. 103 : 29 Bom. L. R. 813 : 25 A. L. J. 117 : 4 O. W. N. 283 : 28 Cr. L. J. 259 : A. I. R. 1927 P. C. 44 : 100 I. C. 227 [overruling Dargahi (1924) 52 C. 499 : 26 Cr. L. J. 1213 : A. I. R. 1925 C. 831 : 88 I. C. 733].
155. Gulabu (1913) 35 A. 260, 263 : 14 Cr. L. J. 211 : 19 I. C. 307 ; Ramdin (1894) Rat. 728.

156. Alimuddin (1895) 23 C. 361, 365. *See also* Pathana 3 P. R. (1904) ; In re Basrur (1911) 36 M. 159 : 13 Cr. L. J. 226 : 14 I. C. 418.
157. Gulabu (1913) 35 A. 260, 263.
158. Nussuruddin (1873) 21 W. R. 5.
159. Bajrangi (1899) 4 C. W. N. 49.
160. Mulu (1880) 2 A. 646, 647, 648 ; In re Ramasami (1886) 2 Weir 378 ; Sonaoollah (1876) 25 W. R. 23, 24.
161. Khadem (1929) 57 C. 940 : 32 Cr. L. J. 180 : A. I. R. 1930 C. 706 : 128 I. C. 801.
162. Subba (1885) 9 M. 83, 85, 86 : 2 Weir 356 ; Kotaigadu (1915) 16 Cr. L. J. 615 : 1915 M. W. N. 544 : 30 I. C. 439.

The former deposition of the witness cannot be read before taking his evidence at the Sessions trial.¹⁶³ To read a previous deposition of a witness and then ask him if it was true, instead of regularly examining him, is irregular; such a procedure amounts to putting a leading question to the witness, and also is an implied intimation that the same story is expected from him again.¹⁶⁴

Previous evidence of a witness, not called and examined, cannot be admitted as evidence in the trial under S. 283 of the Code, but may be admissible under S. 33 of the Evidence Act under the conditions therein.¹⁶⁵

The words "for all purposes subject to the provisions of the Evidence Act" were added by S. 78 of Act XVIII of 1923. The expression "subject to the provisions of the Evidence Act" means "in compliance with the law of evidence under the Evidence Act"; so that evidence wrongly admitted by the Magistrate cannot be used at the trial.¹⁶⁶ It does not refer only to cases where the Act especially authorises its use, nor does it mean that S. 288 can be utilised in all cases except those in which the Act directly prohibits such use; what is meant is that the evidence before the Magistrate can be used for all purposes, if it is evidence under the Act.¹⁶⁷ It may mean probably also that the evidence before the Magistrate can only be used at the trial subject to the procedure laid down in the Evidence Act,¹⁶⁸ as for instance, to contradict a witness it is necessary under S. 145 of the Evidence Act, to draw his attention first to those parts of the previous statement which are to be used for the purpose of contradicting him, so as to afford him an opportunity of explaining their meaning, or denying that they had made any such statements, and so forth.¹⁶⁹

When thus properly admitted, the evidence may, in the discretion of the presiding Judge be treated as evidence for all purposes. Evidence taken before the Magistrate but not used at the trial, cannot be referred to on appeal.¹⁷⁰ The whole of the prisoner's statement is to be treated as evidence and not only portions of it; and, therefore, it is essential to put the whole of it to the witness and then after giving notice to the prosecution and the defence, it could be

163. Radhy (1864) 1 W. R. 14.

164. Piare (1891) 5 C. P. R. 33; Halundar (1870) 2 N. W. P. 100; Kanye (1864) W. R. 38, Gap. No.

165. Natha Singh (1933) 35 P. L. R. 75; 35 Cr. L. J. 349; A. I. R. 1934 L. 212; 147 I. C. 234.

166. Amir Zaman (1925) 6 L. 199; 26 Cr. L. J. 1245; A. I. R. 1925 L. 452; 88 I. C. 861.

167. Jehal Teli (1924) 3 P. 781, 788, 789, 790; 26 Cr. L. J. 270; A. I. R. 1925 P. 51; 84 I. C. 334; Abdul Gani (1925) 53 C. 181, 189; 42 C. L. J. 205; 26 Cr. L. J. 1577; A. I. R. 1926 C. 235; 90 I. C. 537; Behari (1926) 49 A 251; 27 Cr. L. J. 1365; 98 I. C.

485; Basappa Rudrappa (1924) 27 Bom. L. R. 113; 26 Cr. L. J. 705, 706, 707; A. I. R. 1925 B. 266; 86 I. C. 145; Bahadur (1924) 19 S. L. R. 71; 26 Cr. L. J. 1063; A. I. R. 1925 S. 289; 88 I. C. 7; Fazaruddin (1925) 42 C. L. J. 111, 113; 26 Cr. L. J. 1553; A. I. R. 1926 C. 105; 90 I. C. 433; Bigna Kumhar (1926) 27 Cr. L. J. 594; 1926 Pat. 167; A. I. R. 1926 P. 440; 94 I. C. 258.

168. Jehal Teli (1924) 3 P. 781, 790; 26 Cr. L. J. 270; A. I. R. 1925 P. 51; 84 I. C. 334.

169. Dan Sahai (1885) 7. A. 862; 5 A. W. N. 259; Bajrangi (1899) 4 C. W. N. 49. See Zawar Rahman (1902) 31 C. 142 (F. B.).

170. Wazira (1872) 8 B. L. R. App. 63.

brought on the record under S. 288.¹⁷¹ Admitting deposition of a witness under S. 288 without asking him to explain discrepancies is improper.¹⁷²

"For all purposes" means (1) as substantive evidence, (2) or for corroboration of the deposition at the trial, or (3) for contradiction of the deposition at the trial, or (4) for refreshing the memory of the witness.

(1) AS SUBSTANTIVE EVIDENCE.—The object of the amendment is to remove the doubt as to the use of the evidence given before the Committing Magistrate, as substantive evidence at the trial, when it has, in the discretion of the Court, been properly brought on the record. Its use is not limited to the purposes of corroboration or contradiction of the evidence at the trial, but it can be acted upon precisely as if that evidence had been deposed to before the Sessions Judge.¹⁷³ If the phrase was limited to the purposes mentioned in Ss. 155 and 157 of the Evidence Act, S. 288 of the Cr. P. Code would be superfluous.¹⁷⁴ In another view the expression "for all purposes" means "for the purposes of determining the guilt or innocence of the accused".¹⁷⁵ In *Q. v. Amanullah*¹⁷⁶ it was held that a Judge may base his judgment on the evidence given before the Magistrate in the presence of the accused, when there are special and particular reasons for considering that evidence to be honest and true, and when that evidence is to a certain extent corroborated by independent testimony before himself; and in *E v. Jadub*,¹⁷⁷ it was held that S. 288 was not intended to be used for the purpose of enabling the Court to take a witness's deposition bodily from the Committing Magistrate's record and to treat it as evidence before itself. Hence it was held in *Abdul Gani*

171. *Musa* (1928) 30 Cr. L. J. 333 : A. I. R. 1929 N. 233 : 114 I. C. 609 ; In re Ayyaperumal (1925) 27 Cr. L. J. 18 : A. I. R. 1925 M. 879 : 1925 M. W. N. 319 : 91 I. C. 50.

172. *Sadar Din* (1928) 10 L. L. J. 460 : 29 Cr. L. J. 1047 : A. I. R. 1929 L. 111 : 112 I. C. 471 ; *Lachhmi* (1922) 23 Cr. L. J. 218 : A. I. R. 1922 P. 40 : 1922 Pat 159 : 65 I. C. 1102.

173. *Amir Zaman* (1925) 6 L. 199, 202 : 26 Cr. L. J. 1245 : A. I. R. 1925 L. 452 : 88 I. C. 861 ; *Basappa Rudrappa* (1924) 27 Bom. L. R. 113 : 26 Cr. L. J. 705 : A. I. R. 1925 B. 266 : 86 I. C. 145 ; *Behari* (1926) 49 A. 251 : 27 Cr. L. J. 1365 : 98 I. C. 485. See also *Mam Chand* (1924) 5 L. 324 : 25 Cr. L. J. 1201 : A. I. R. 1924 L. 609 : 82 I. C. 129 ; *Gansa* (1923) 2 P. 517 : 24 Cr. L. J. 641 : A. I. R. 1923 P. 550 : 73 I. C. 561 ; *Puran Singh* (1934) 15 L. 765 : 35 Cr. L. J. 1005 : A. I. R. 1934 L. 743 : 149 I. C. 476 [relying on *Amir Zaman* (1925) 6 L. 199 : 26 Cr. L. J. 1245 : A. I. R. 1925 L. 452 : 88 I. C. 861 ;

Abdul Gani (1925) 53 C. 181 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537 ; *Jehangir* (1927) 29 Bom. L. R. 996 : 28 Cr. L. J. 1012 : A. I. R. 1927 B. 501 : 106 I. C. 100].

174. *Basappa Rudrappa* (1924) 27 Bom. L. R. 113 : 26 Cr. L. J. 705 : A. I. R. 1925 B. 266 : 86 I. C. 145.

175. *Tulli* (1924) 47 A. 276, 278, 279 : 26 Cr. L. J. 450 : A. I. R. 1925 A. 185 : 85 I. C. 130 ; *Abdul Gani* (1925) 53 C. 181 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537 ; *Basappa Rudrappa* (1924) 27 Bom. L. R. 113 : 26 Cr. L. J. 705 : A. I. R. 1925 B. 266 : 86 I. C. 145 (*Per Crump, J.*).

176. *Amanullah* (1874) 21 W. R. 49 : 12 B. L. R. App. 15. See also *Dan Sahai* (1885) 7 A. 862 : 5 A. W. N. 259 ; *Jeochi* (1898) 21 A. 111 : 18 A. W. N. 196 ; *Bharmappa* (1888) 12 M. 123 : 2 Weir 376.

177. *Jadub* (1899) 27 C. 295 : 4 C. W. N. 129.

V. E.,¹⁷⁸ that the words "for all purposes" were added to remove the limitation as to the necessity of corroboration laid in the above two cases, and that evidence admitted under S. 288 may be the basis of the Judge's finding or the verdict, it being on the same footing as any other evidence. Such evidence may be used as much in favour of the defence as in support of the prosecution.¹⁷⁹ The question of its value, and whether a conviction may be based on it, wholly or partly, are not dealt under S. 288, but are for the Jury, assessors or the Judge, and the superior Court in each case.¹⁸⁰ The Legislature in amending the Section has, it seems, followed the decisions noted at foot, which held that the previous deposition could be used as substantive evidence and not merely to contradict the witness¹⁸¹, and as part of the materials for the consideration of the Jury or the Judge and assessors.¹⁸² The object of the Section is to provide for the contingency that may arise when a witness who is produced before a Sessions Court holds back information and tells a different story from that told in the preliminary inquiry.¹⁸³ Previous statements are ordinarily admissible to contradict or corroborate witnesses. The Section must be employed when there is reason to believe that a witness at a trial is deliberately departing from the evidence he gave before the Magistrate and where it is considered by the trial Judge to bring the whole statement, made before, as substantive evidence.¹⁸⁴ The object and effect of S. 288 is to place the deposition in the committal inquiry on exactly the same footing as the depositions in the Sessions Court.¹⁸⁵

But the Patna High Court has followed the view taken in some of the earlier cases prior to the amendment of the Section, and has held that the evidence before the Committing Magistrate cannot be effectively utilized to support a conviction unless it is shown by other evidence in the case that it should be preferred to and substituted for the statement

178. *Abdul Gani* (1925) 53 C. 181 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537 [not relying on *Jehal Teli* (1924) 3 P. 781 : 26 Cr. L. J. 270 : A. I. R. 1925 P. 51 : 84 I. C. 334 ; holding obsolete *Amanullah* (1874) 21 W. R. 49 ; *Jadub* (1899) 27 C. 295 ; 4 C. W. N. 129 ; *Nirmal Das* (1900) 22 A. 445 : 20 A. W. N. 169 ; and following *Dwarka Kurmi* (1906) 28 A. 683 : 3 A. L. J. 852 : 4 Cr. L. J. 61 ; *Umar* (1887) P. R. No 132]. See also *In re Bachala* (1923) 47 M. 232 : 25 Cr. L. J. 715 : A. I. R. 1924 M. 379 : 81 I. C. 203.
179. *Doraisami* (1901) 24 M. 414 : 2 Weir 377.
180. *Umar* (1887) P. R. No. 132.
181. *Doraisami* (1901) 24 M. 414 : 2 Weir 377 ; *Dwarka Kurmi* (1906) 28 A. 683 : 3 A. L. J. 852 : 4 Cr. L. J. 61 ; *Maruti* (1921) 46 B. 97 : 22 Cr. L. J. 636 : 63 I. C. 332 ; *Gansa* (1923) 2 P. 517 : 24 Cr. L. J. 641 : A. I. R. 1923 P. 550 : 73 I. C. 561 ; *In re Velliah*

- Kone* (1922) 45 M. 766, 768, 769, 771, 772 : 24 Cr. L. J. 417 : A. I. R. 1923 M. 20 : 72 I. C. 529 ; *Bachala* (1923) 47 M. 232 : 25 Cr. L. J. 715 : A. I. R. 1924 M. 379 : 81 I. C. 203 ; *Umar* (1887) P. R. No. 132 ; *In re Basrur* (1911) 36 M. 159 : 13 Cr. L. J. 226 : 14 I. C. 418.
182. *Dwarka Kurmi* (1906) 28 A. 683 : 3 A. L. J. 852 : 4 Cr. L. J. 61 [dissenting from *Dan Sahai* (1885) 7 A. 862 : 5 A. W. N. 259 ; *Velliah Kone* (1922) 45 M. 766, 768 : 24 Cr. L. J. 417 : A. I. R. 1923 M. 20 : 72 I. C. 529.
183. *Mulu* (1880) 2 A. 646.
184. *Abdul Jalil* (1930) 32 Cr. L. J. 152 : 1930 A. L. J. 1105 : A. I. R. 1930 A. 746 : 128 I. C. 593.
185. *Manar Ali* (1933) 60 C. 133 : 37 C. W. N. 1066 : 58 C. L. J. 66 : 35 Cr. L. J. 567 : A. I. R. 1934 C. 124 : 147 I. C. 1203.

made at the trial and that unless the statement is materially corroborated by other evidence or shown true by facts clearly established by other evidence, it cannot support a conviction. ¹⁸⁶

The Oudh Chief Court has also held that corroboration is necessary. ¹⁸⁷

The Allahabad High Court has taken a middle course and has held that the Court may, if satisfied that the previous depositions of the witness are true and those made at the trial are false, rely on the former to uphold the conviction, though ordinarily they should not be acted upon when wholly uncorroborated. ¹⁸⁸ When an approver, to whom pardon was granted, repudiated at the trial his statement before the Magistrate as being given under compulsion, *held*, that this repudiation did not prevent the Sessions Court from considering his evidence before the Magistrate under S. 288¹⁸⁹; but the use of it as substantive evidence of the facts alleged on the prior occasion is fraught with the greatest peril, and could never have been intended by the Legislature. ¹⁹⁰

The Madras High Court has held that it is a matter for the exercise of judicial discretion, whether in the circumstances of a given case, the depositions can be used as substantive evidence in the Sessions trial; such discretion will be properly exercised if there is some independent corroborative evidence to show that the earlier statements are more likely to prove true than the latter statements given in the Sessions Court. ¹⁹¹

The Rangoon High Court has held that a judgment may be based upon a deposition taken before a Committing Magistrate when the Court could not see special reasons for disbelieving the original statement to be true either from the evidence of the same witnesses before itself or when that statement is to a certain extent corroborated by independent testimony; such evidence is, however, subject to the provisions of the Evidence Act. ¹⁹²

The Lahore High Court has held that there is nothing in S. 288 Cr. P. C. itself to show that there need be corroboration of evidence so recorded. The evidence is precisely the same as any other evidence. It has, like other evidence, to be examined with care: the Judge or Jury, as the case may be, must make up their minds whether the evidence is to be believed or not, and if it is to be believed, what value is to be placed upon it. No general

186. *Jehal Teli* (1924) 3 P. 781 : 26 Cr. L. J. 270 : A. I. R. 1925 P. 51 ; 84 I. C. 334 [approving *Amanullah* (1874) 21 W. R. 49 and referring to *Dan Sahai* (1885) 7 A. 862 : 5 A. W. N. 259 ; *Jadub* (1899) 27 C. 295 : 4 C. W. N. 129 ; *Doraisami* (1901) 24 M. 414 : 2 Weir 377 ; *Dwarka Kurmi* (1906) 28 A. 683 : 3 A. L. J. 852 : 4 Cr. L. J. 61 ; *Maruti* (1921) 46 B. 97 : 22 Cr. L. J. 636 : A. I. R. 1922 B. 108 : 63 I. C. 332 ; *Bhut Nath* (1902) 7 C. W. N. 345] ; *Bigna Kumhar* (1926) 27 Cr. L. J. 594 : 1926 P. 167, 171, 172 : A. I. R. 1926 P. 440 : 94 I. C. 258. See also *Lalji Rai* (1935) 37 Cr. L. J. 235 : A. I. R. 1936 P. 11 : 160 I. C. 81.

187. *Pahalwan Singh* (1934) 11 O. W. N. 508 : 35 Cr. L. J. 797 : A. I. R. 1934 O. 182 : 148 I. C. 937.

188. *Tulli* (1924) 47 A 276, 278, 279 : 26 Cr. L. J. 450 : A. I. R. 1925 A. 181 : 85 I. C. 130 [referring to *Jeochi* (1898) 21 A. 111 ; 18 A. W. N. 196 ; *Nirmal Das* (1930) 22 A. 445 : 20 A. W. N. 169 ; *Dwarka Kurmi* (1906) 28 A. 683 : 3 A. L. J. 852 : 4 Cr. L. J. 61 ;

189. *Soneju* (1899) 21 A. 175 : 19 A. W. N. 14.

190. *Nirmal Das* (1930) 22 A. 445 : 20 A. W. N. 169.

191. *Sokkandi Pandaram* 1934 M. W. N. 1228.

192. *Nga Nyein* (1932) 11 R. 4 : 34 Cr. L. J. 286 : A. I. R. 1933 R. 57 : 142 I. C. 87.

law can therefore be laid down as to this. This evidence must be judged, as all evidence must be, according to the facts of each particular case. There is no difference in law between evidence of this sort and any other evidence.^{192a}

In any case, as a matter of prudence, though not of law, there should be some reason for preferring them to the statements at the trial.¹⁹³ It is not expedient to lay down a general rule as to the effect to be given to evidence before the Magistrate's Court except that it must be accepted with greater caution than the evidence of a witness who has adhered to his previous statement.¹⁹⁴ Such evidence must be scrutinised like the other evidence in the case and the Court must consider whether it can be believed or not, after due regard to the fact of its contradictory character.¹⁹⁵ The Jury must be given the option to act upon it or not.¹⁹⁶

In this connection it should be noted that S. 249 of the Code of 1872, corresponding to the present S. 288, was better worded. It ran as follows:—"When a witness is produced before the Court of Session or High Court, the evidence given by him before the Committing Magistrate may be referred to by the Court, if it was duly taken in the presence of the accused person, and the Court may, if it thinks fit, ground its judgment thereon, although the witness may, at the trial, make statements inconsistent therewith".

(2) FOR CORROBORATION.—Under S. 157 of the Evidence Act, in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact before any competent authority legally competent to investigate the fact, may be proved. The principle, on which this rule of evidence is based, is that he who is consistent in all his statements, previous and subsequent, fully deserves to be believed: consistency is a ground for belief.¹⁹⁷ The nature of such corroborative evidence, however, varies, and a person may persistently adhere to a falsehood once uttered with design. The Judge, however, should discriminate between such evidence and that which really corroborates. It has been held in *In re Velliah Kone*,¹⁹⁸

192(a). *Narinjan* (1935) 37 Cr. L. J. 567 : A. I. R. 1936 L. 357 : 162 I. C. 379 [applying *Umar* 51 P. R. 1887 (Cr.)].

193. *Bahadur* (1924) 19 S. L. R. 71 : 26 Cr. L. J. 1063, 1066, 1067 : A. I. R. 1925 S. 289 : 88 I. C. 7. [following *Maruti* (1921) 46 B. 97 : 22 Cr. L. J. 636 : A. I. R. 1922 B. 108 : 63 I. C. 332 ; *Jadub* (1899) 27 C. 295 : 4 C. W. N. 129 ; *Doraisami* (1901) 24 M. 414 : 2 *Weir* 377].

194. *Basappa Rudrappa* (1924) 27 Bom. L. R. 113 : 26 Cr. L. J. 705 : A. I. R. 1925 B. 266 : 86 I. C. 145 (*Per Crump, J.*). See also *Velliah Kone* (1922) 45 M. 766, 768, 769 : 24 Cr. L. J. 417 : A. I. R. 1923 M. 20 : 72 I. C. 529 ; *Abdul Gani* (1925) 53 C. 181, 190, 191 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537 ; *Bigna*

Kumhar (1926) 27 Cr. L. J. 594 : 1926 P. 167, 171 : A. I. R. 1926 P. 440 : 94 I. C. 258 ; *Mam Chand* (1924) 5 L. 324, 328 : 25 Cr. L. J. 1201 : A. I. R. 1924 L. 609 : 82 I. C. 129.

195. *Basappa Rudrappa* (1924) 27 Bom. L. R. 113 : 26 Cr. L. J. 705 : A. I. R. 1925 B. 266 : 86 I. C. 145 (*Per Crump, J.*).

196. *Abdul Gani* (1925) 53 C. 181, 190, 191 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 ; A. I. R. 1926 C. 235 : 90 I. C. 537.

197. *Gilbert on Evidence*, P. 135.

198. *Velliah Kone* (1922) 45 M. 766 : 24 Cr. L. J. 417 : A. I. R. 1923 M. 20 : 72 I. C. 529 [followed in *Mam Chand* (1924) 5 L. 324 : 25 Cr. L. J. 1201 : A. I. R. 1924 L. 609 : 82 I. C. 129, *Contra*, *Akbar Badu* (1910) 34 B. 599 : 11 Cr. L. J. 542 : 7 I. C. 933].

that when the evidence of witnesses given during the preliminary inquiry before the Committing Magistrate is once admitted as evidence under S. 288 Cr. P. C. at the trial in the Sessions Court, it stands exactly on the same footing as a deposition given in that Court, and constitutes the testimony of a witness under S. 157 of the Evidence Act, to corroborate which the former statement of the witness given before the investigating officer under S. 164 Cr. P. C. is admissible in evidence. Under S. 288, the previous testimony may be given in evidence by either party in corroboration of the evidence of the witness at the trial.¹⁹⁹

(3) FOR CONTRADICTION.—The Sections of the Evidence Act under which the previous deposition of the witness can be put in for the purpose of contradicting his evidence at the trial, are Ss. 145 and 155 (3) read with S. 153. The Evidence Act appears to have made a distinction between 'contradicting a witness' and 'impeaching the credit of a witness'. The effect of the above three Sections seems to be this:—When questions, put to a witness on cross-examination for the purpose of directly testing his credit, relate to relevant facts, his answers may be contradicted by independent evidence (e. g., his previous deposition read with S. 80 of the Evidence Act); if questions are put with this object upon irrelevant facts, the answers given cannot be contradicted except in the case of a denial of previous conviction or a denial of his partiality (Exceptions 1 and 2 to S. 153). If such denials can be shown to be false from his previous deposition before the Committing Magistrate, the said deposition may be put in. Again, a party may with the permission of the Court cross-examine his own witness (S. 154) and impeach his credit by, amongst others, proof of the previous statement inconsistent with any part of his evidence liable to be contradicted (S. 155 (3)). So far, therefore, as the Evidence Act goes, the previous statement, when put in under the aforesaid Sections of the Evidence Act, can be used only to discredit the witness, or if put in under S. 157 it can be used only for corroborating him. And so, in some of the earlier decisions, it was held that the previous statement could be used only for the purpose of contradicting the witness and not as substantive evidence; even under S. 288 Cr. P. Code.²⁰⁰ But as Kernan, C. J. observed :—²⁰¹, "Without this Section 288 a witness might be cross-examined as to his prior evidence before the trial and such prior evidence might be relied on to discredit the witness; but his evidence before the Magistrate could not be treated as evidence in the case, except under proper circumstances governed by S. 288. In my judgment, S. 288 applies to the evidence of cases of individual witnesses, each case treated by itself and under the circumstances of which the Judge in his discretion thinks it advisable for the ends of justice that the prior evidence should be treated as evidence." And in the same case Muthusami Ayyar, J. also observed, :—"The intention (of S. 288) was to confer a power on the Judge, when he considers that the evidence given before the Magistrate is true and that the evidence given

199. Bigna Kumhar (1926) 27 Cr. L. J. 594; 1926 P. 167, 171; A. I. R. 1926 P. 440; 94 I. C. 258.

200. Nirmal Das (1900) 22 A. 445; 20 A. W. N.

169 [following Dan Sahai (1885) 7 A. 852; 5 A. W. N. 259]; Gholam (1906) 10 C. W. N. cxxliii; Hiroo (1870) Rat. 39.

201. Subba (1885) 9 M. 83, 86; 2 Weir 356.

before him is not true, to treat the former as evidence in the cause, that is to say as evidence on which he may found the conviction or acquittal of the prisoner." S. 288 of the Code has, therefore, gone further that S. 155 of the Evidence Act and made statements made before the Committing Magistrate "evidence in the case" i. e., substantive evidence of the facts therein deposed to,²⁰² and not merely to contradict the witness (*See Notes under the heading "As substantive evidence," ante*). When a Sessions Judge admits a deposition of a witness taken before the Committing Magistrate as evidence in the trial under S. 288, he should in his proceedings distinctly note that he has done so, and give the deposition a number in his proceedings and translate it or the material portions of it in his English minute of the proceedings. When Counsel or pleader cross-examines a witness with reference to a previous deposition, the parts thereof to which the cross-examination is directed should be set out in the Judge's minute of the proceedings; the deposition itself need not in such a case be made a portion of the evidence in the Sessions Court, unless the Government pleader desires that it should be so recorded or the Sessions Judge adopts it under S. 288.²⁰³ Where a Sessions Judge read to the Jury the evidence of witnesses taken before the Committing Magistrate, and it did not appear that that evidence was ever read over to the witnesses, and the depositions were not recorded in the trial before the Sessions Court, the High Court drew the Judge's attention to the provisions of S. 145 of the Evidence Act and asked him to note for his future guidance that when he admits such statements in evidence, he should record them as exhibits in his own proceedings.²⁰⁴

(4) FOR REFRESHING MEMORY.—Under S. 159 of the Evidence Act, the previous deposition may be used by the witness for refreshing his memory for obtaining from him an explanation of discrepancies or for contradicting his present testimony.²⁰⁵

15. Discretion of the Presiding Judge.—

When the previous deposition of the witness is brought on the record of the trial at the Sessions Court, at the instance of either party or by the Court of its own motion under S. 288, the question of the Court's discretion as to how to use it comes in. As observed by Plowden, J. in *Umar v. E*:²⁰⁶ "There is nothing in the Section which prescribes the value or weight to be attached to the evidence admitted. Once admitted, the power given by this Section in respect of the evidence is exhausted, the discretion of the Judge extending only to the question whether the former evidence is to be treated as evidence in the case. Once admitted, it is on the same footing with all other evidence in the case; that is to say, it is to be considered by the Jury or by the assessors and the Judge, according to the nature of the trial, as part of the materials upon which the verdict or the finding is to be given. The value of the previous evidence is a matter entirely beyond the scope of the Section, as it is also of the Evidence Act.

202. *Maruti* (1921) 46 B. 97 : 22 Cr. L. J. 636 :
A.I.R. A 1922 B. 108 : 63 I. C. 332. *See also*
Peda Somudu (1923) 47 M. 232 : 25 Cr. L. J.
715 : A. I. R. 1924 M. 379 : 81 I. C. 203.

203. *Govardhan* (1887) Rat. 343.

204. *Soma Dalji* (1897) Rat. 924.

205. *Radhy* (1854) I W. R. 14.

206. *Umar* (1837) P. R. No. 132.

Its value is a question in the particular case for the Jury or for the assessors, subject to the directions of the Judge in summing up or for the Judge in cases where he is a judge of the facts. Whether any portion or the whole of the evidence thus admitted is entitled to credit, and if so, to such a degree that a conviction may be based upon it, wholly or in part, are very important questions for the Jury, or assessors or for the Judge, as the case may be, but they are in no way affected by this Section". Although under the present amended Section, a retracted statement of a witness may be treated as a substantive piece of evidence discarding wholly his testimony at the trial Court, the observations of Phear, J. in *Q. v. Amanullah*²⁰⁷ should be borne in mind, viz :—"Court's discretion should be exercised upon substantive materials rightly placed before the Court and reasonably sufficient to guide the judgment of the Court to the truth of the matter and not upon mere speculation and conjecture". Before a Judge uses a previous deposition as evidence, on which to form his judgment, he is bound to let his intention, or the possibility that he may do so, be known to the accused and the prosecution, in order to afford the accused and the prosecution an opportunity of testing such statement by cross-examination or otherwise, dealing with such statement as part of the case which may be taken into consideration by the Judge. Otherwise, it is impossible for the prosecution or the defence to deal with the matters which may influence the Judge's mind in coming to a decision.²⁰⁸ The previous deposition is admissible only when in the exercise of his discretion the Judge determines so to use it, and his decision is reviewable by the High Court.²⁰⁹ If the statements differ materially from those made to the Magistrate, he ought to examine the witness on such statement, especially if the accused is undefended, and make the previous deposition evidence in the case. If the Sessions Judge has omitted to examine witnesses on obvious and important discrepancies in their statements, the High Court will, in general, direct that such an examination be made and the Sessions Judge, having the witnesses before him for such purpose, will, in most cases, feel it his duty to make the former depositions evidence *quantum valeant* for the purpose of the final adjudication in appeal. The alternative is for the High Court, in such cases, to order a new trial on the ground that there has been a misuse of the Sessions Judge's discretion, which may have caused a defeat of justice ; but a new trial will not be ordered except in special cases.²¹⁰ The Judge should act with great caution and refuse to place on the record the previous statement when retracted and declared to be forced, without enquiry into the alleged illegal detentions and threats by the Police.²¹¹ It ought not to be put on the record when the witnesses are wholly untrustworthy at the trial.²¹² The Judge may act under S. 288 on the application of the accused.²¹³ Admission of the previous evidence is improper when the witness has shown no disposition to resile from the former statement, or has merely omitted to repeat a statement at the trial, not contradictory of any evidence given

207. *Amanullah* (1874) 21 W. R. 49 : 12 B. L. R. App 15. See also *Jehal Teli* (1924) 3 P. 781, 791 : 26 Cr. L. J. 270 : A. I. R. 1925 P. 51 : 84 I. C. 334.

208. *Jewahar* (1886) 6 A. W. N. 256.

209. *Arjun* (1874) 11 Bom. H. C. R. 281.

210. *Ibid.*

211. *Bajrangi* (1899) 4 C. W. N. 49.

212. *Gansa* (1923) 2 P. 517, 526 : 24 Cr. L. J. 641 : A. I. R. 1923 P. 550 : 73 I. C. 561.

213. *Stewart* (1904) 31 C. 1050, 1051 : 8 C. W. N. 528 : 1 Cr. L. J. 451.

thereat, when he was not questioned about it.²¹⁴ The Section does not apply unless the witness makes statements inconsistent with those made to the Magistrate.²¹⁵ Inconsistency is the ordinary ground, but there are others on which the Section may be used : as, where he holds back the evidence and tells a different story,²¹⁶ or is unable to identify the accused owing to their altered appearances,²¹⁷ or does not tell the real facts through mistake or forgetfulness.²¹⁸ Where the witnesses identified the accused before the Magistrate, but failed to identify them at the Sessions trial owing to their altered appearances ; it was held that the Judge ought to have acted under S. 288, and the High Court directed the Judge under S. 428 to bring their statements before the Magistrate on the Sessions record after notice to the accused.²¹⁹ The Judge must be satisfied on judicial grounds, that the previous deposition was true, and that before him is false.²²⁰ As to the necessity of corroboration, *see* notes under heading "As substantive evidence," *ante*.

There is nothing to prevent the Court in the exercise of its discretion to accept the statement in examination-in-chief to be true and to disbelieve the retracting cross-examination, but the examination-in-chief and the retracting cross-examination should both be transferred to the Sessions file.²²¹ The whole statement should be filed, and the Court may then come to a conclusion after weighing the evidence : it is irregular to mark only portions of it and use the latter to contradict the statement before the Judge.²²²

Approver's statement before the Committing Magistrate, subsequently resiled from in the Sessions Court, can be taken into consideration, provided it is brought on the record under S. 288.²²³

Though a Sessions Judge has a discretion to put in depositions given before the Committing Magistrate, yet a damaging deposition that would seriously prejudice the case of the accused, as not having been subjected to cross-examination, ought not to be put in for the first time before the Jury.²²⁴

214. Bajrangi (1899) 4 C. W. N. 49, 55.

215. Majohur (1875), 24 W. R. 11, 12.

216. Mulu (1880) 2 A. 646, 648.

217. Nagina (1921) 19 A. L. J. 947, 950 ; Abdul Wahab (1924) 47 A. 39 : 27 Cr. L. J. 836 : A. I. R. 1925 A. 223 : 95 I. C. 756.

218. Subba (1885) 9 M. 83, 86 : 2 Weir 356.

219. Nagina (1921) 19 A. L. J. 947.

220. Peda Somudu (1923) 47 M. 232 : 25 Cr. L. J. 715 : A. I. R. 1924 M. 379 : 81 I. C. 203.

221. Muhammad Aslam (1926) 9 L. L. J. 45 : 28 Cr. L. J. 33, 36, 38 : A. I. R. 1926 L. 590 : 99 I. C. 65.

222. *In re Ayyaperumal* (1925) 1925 M. W. N. 319 : 27 Cr. L. J. 18 : A. I. R. 1925 M. 879 :

91 I. C. 50 ; Musa (1928) 30 Cr. L. J. 333 : A. I. R. 1929 N. 233 : 114 I. C. 609.

223. Bhikari (1929) 9 P. 592 : 32 Cr. L. J. 66 : A. I. R. 1930 P. 545 : 128 I. C. 114 [referring to Jehal Teli (1924) 3 P. 781 : 26 Cr. L. J. 270 : A. I. R. 1925 P. 51 : 84 I. C. 334 ; Sheonarain (1928) 8 P. 262 : 30 Cr. L. J. 716 : A. I. R. 1929 P. 212 : 117 I. C. 43 ; Ratan Dhanuk (1928) 8 P. 235 : 30 Cr. L. J. 137 : A. I. R. 1928 P. 630 : 113 I. C. 329] ; Kesava Pillai (1929) 53 M. 160 : 57 M. L. J. 681 : 31 Cr. L. J. 768 : A. I. R. 1929 M. 837 : 125 I. C. 77.

224. Khadem (1929) 57 C. 940 : 32 Cr. L. J. 180 : A. I. R. 1930 C. 70c : 128 I. C. 801.

CHAPTER VI.

E.—Trial to close of case for the defence—Ss. 289-296.

S. 289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case; and if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence that the accused committed the offence, the Court shall call on the accused to enter on his defence.

S. 290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

S. 291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

S. 292. The prosecutor shall be entitled to reply—

- (a) If the accused or any of the accused adduces any oral evidence; or
- (b) with the permission of the Court, on a point of law; or
- (c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence:

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

S. 293. (1) Whenever the Court thinks that the jury or assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the jury or assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

S. 294. If a juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

S. 295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting until the conclusion of the trial.

S. 296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

List of Headings :—

1. Procedure after examination of witnesses for the prosecution.
2. Examination of the accused (S. 342).
3. Meaning of the expression, "Question him generally on the case."
4. Sub-s. (2) of S. 342.
5. Sub-s. (3) of S. 342.
6. Sub-s. (4) of S. 342.
7. Procedure after asking the accused whether he means to adduce evidence (S. 289).
8. Prosecutor may sum up his case.
9. 'No evidence'.—Meaning of.
10. 'Call on the accused to enter on his defence'.—Meaning of.
11. Procedure, after the Court calls upon the accused to enter on his defence (S. 290).
12. Defence of *alibi*.
13. Pleading Exceptions.
14. Summing up the defence case.
15. Summoning of defence witnesses (S. 291).
16. Prosecutor's Right of Reply (S. 292).
17. Local Inspection by Jury or Assessors (S. 293), and by Judges (S. 539 B).
18. Notice of Local Inspection to the parties.
19. Record of memorandum of relevant facts observed at Inspection.
20. When a juror or assessor or a Judge may be examined (S. 294).
21. Adjournment of trial.—Attendance of jurors or assessors (S. 295).
22. Continuation of a trial by the successor of the Judge.
23. Locking up Jury (S. 296).

1. Procedure after Examination of Witnesses for the Prosecution.—

The case for the prosecution is finished when the prosecutor has finished the examination of his witnesses (S. 286), has tendered the examination of the accused before the Committing Magistrate (S. 287) and the presiding Judge has brought on the record of the trial the depositions before the Committing Magistrate of any witness or witnesses, which he, in his discretion, allows to be treated as evidence in the case (S. 288).

Besides the witnesses examined by the prosecutor, there may be other witness or witnesses called by the Court, because under S. 540 of the Code the Court has such power to examine any person as a witness at any stage of the trial, and it is obligatory on the part of the Court to summon and examine a person if his evidence appears to it essential to the just decision of the case.¹ The Court has also power, under the same Section, to recall and re-examine a witness already examined. The parties are entitled to cross-examine a witness called and examined by the Court, and they cannot be restricted in their cross-examination to the point on which the Court has examined him.² When after the close of the argument the Court admits a document as fresh evidence in favour of the prosecution, it should ascertain from the accused whether there was any evidence that they wished to

1. Ram Sarup (1901) 6 C. W. N. 98.

2. Chintamon (1907) 35 C. 243 : 12 C. W. N.

299 : 7 C. L. J. 177 : 7 Cr. L. J. 146 ;

Mohendro (1902) 29 C. 387 : 6 C. W. N. 550.

give in rebuttal, apart from the question of cross-examining the witness, and if necessary grant an adjournment.³ The prosecution cannot examine a new witness by interposing in the midst of the case of the accused, but the Court may, in its discretion, allow it for good cause under S. 540.⁴ That Section, however, does not authorise a Sessions Judge to examine the witnesses for the defence before the case for the prosecution is closed, because that would be reversing the order of a Sessions trial.⁵ But the irregularity is not fatal when the parties are not materially prejudiced thereby.⁶ When there was no evidence regarding the nature of the injuries which formed the subject of the offence under trial, the Sessions Judge was bound under S. 540 to summon the Medical Officer as a witness.⁷ The Court is not bound to examine a witness, who was examined by the Committing Magistrate but who was not examined at the trial by the prosecutor because he could not rely on his testimony.⁸ The Public Prosecutor cannot demand, as of right, that a witness not examined by the Magistrate should be called and examined; it is within the discretion of the Court.⁹ In a case in which there is a matter necessitating inquiry or there is a question to be cleared up, and the witness proposed by the defence to be called is one upon whose testimony the Court could place confidence, it should call him; but it should not call a witness on whose evidence the Court would not place reliance, though that witness was examined by the Committing Magistrate but the prosecution did not examine him at the trial as it considered him unreliable.¹⁰

The Court has another power given to it by law, namely by S. 165 of the Evidence Act, under which the Judge may, in order to discover, or to obtain proper proof of relevant facts, ask any question he pleases, in any form and at any time, of any witness or of the parties, about any fact, relevant or irrelevant; and may order the production of any document or thing. Neither the parties, nor their agents shall be entitled to make any objection to such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question: provided that the judgment must be based upon facts declared by the Evidence Act to be relevant, and duly proved, and provided further that this power to question is subject to the provisions of Ss. 121 to 131, S. 168 and S. 149 of the Evidence Act (*See* S. 165 of the Evidence Act). A Judge or Magistrate in India frequently has to perform duties which in England would be performed by Police officers or attorneys. He has to sift out the truth for himself as well as he can and with little assistance of a professional kind. S. 165 is therefore intended to arm the Judge with the most extensive power possible for the purpose of getting at the truth. The effect of this Section is that, in order to get to the bottom of the matter before it, the Court will be able to look at and enquire into

3. Mafizuddin v. Sekandar (1933) 37 C. W. N. 1186 : 35 Cr. L. J. 538 : A. I. R. 1934 C. 133 : 147 I. C. 1095.
 4. Kassy Singh (1874) 21 W. R. 61.
 5. Hargobind (1892) 14 A 242 : 12 A.W.N. 83.

6. In the matter of Taribullah (1879) 4 C.L.R. 338.
 7. Ram Sarup (1901) 6 C. W. N. 98.
 8. Stanton (1892) 14 A. 521 : 12 A. W. N. 110.
 9. Hayfield (1892) 14 A. 212 : 12 A. W. N. 63
 10. Kaliprosunno (1886) 14 C. 245.

any fact whatever.¹¹ A Judge may ask any question he pleases about any irrelevant fact, if he does so in order to discover or to obtain proper proof of relevant facts.¹² When after the examination of a witness by the prosecution and cross-examination by the defendant, the Court takes him in hand, he is put under special pressure, as the Judge is empowered to ask any question he pleases, in any form, about any fact, relevant or irrelevant, under S. 165 of the Evidence Act; and he is therefore at the same time placed under the special protection of the Court, which may, in its discretion, allow a party to cross-examine; but this cannot be asked for as a matter of right.¹³ It should be remembered, however, that it is not the province of a Court to examine the witnesses, unless the pleaders on either side have omitted to put some material question; and the Court should, as a rule, leave the witness to be dealt with by the pleaders as laid down in S. 138 of the Evidence Act. Where, therefore, a Judge questioned the witnesses at considerable length after their examination-in-chief by the prosecution was finished, upon points to which he must have known that the cross-examination would certainly and properly be directed, it was held that such a course of procedure was irregular and opposed to the provisions of S. 138 of the Evidence Act.¹⁴

The Jury or assessors may also put questions to the witnesses. S. 166 of the Evidence Act provides that the Jury or assessors may put any questions to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper. But where the Judge allowed the Jury to make an experiment about the identification of the accused in the absence of the accused, by reason of which the Jury ultimately brought in their verdict, a verdict which the jurors were not in a position to deliver before the experiment was allowed to be made, there was a serious irregularity; the verdict of the Jury in such circumstances is not proper and must be set aside.¹⁵ If a Juror or assessor is personally acquainted with any relevant fact, it is his duty to inform the Judge, whereupon he may be examined as any other witness (S. 294).

Lastly, the Court, while recording the evidence for the prosecution, may at any time question the accused to enable him to explain any circumstances appearing in evidence against him and such question and answer must be recorded in the manner provided for by S. 364 of the Code. The circumstances under which the Court may ask such questions have been dealt with under the next heading.

Besides the oral statements of witnesses, there may be documentary evidence, such as a confession recorded under Ss. 164 and 364 of the Code, but the same is brought on record through some witness or witnesses. Evidence may be recorded on commission but commissions ought not to issue without good and sufficient reasons.¹⁶ In that case it was doubted whether the opportunity to administer cross-interrogatories is an opportunity to cross-examine

11. Field's Evidence, 8th Ed., P 886.

12. Hari Lakshman (1885) 10 B. 185.

13. Saktharam (1874) 11 Bom. H. C. R. 166.

14. Noor Bux (1880) 6 C. 279 : 7 C. L. R. 385.

15. Sarup Ali (1934) 38 C. W. N. 1154 : 60 C.L.J.

194 : 36 Cr. L. J. 129 : A. I. R. 1934 C. 744 :
152 I. C. 661.

16. Ram Chandra Govind Harshe (1895) 19 B. 749.

within the meaning of the proviso to S. 33 of the Evidence Act. In a case tried by a Jury, when an application for the issue of a commission for the examination of a witness was made, Wilson, J. said—"The difficulty seems to be in the time you make your application. The Jury are sworn* * I do not think I can grant this application. I think that to do so would be wholly without precedent after the Jury have been sworn."¹⁷ The deposition of a witness before the Coroner cannot be taken in evidence under S. 33, where the witness died before the commitment enquiry, because although the proceeding before the Coroner is a judicial proceeding, yet it is not a proceeding between the prosecutor and the accused. The proceedings before the Coroner are merely an inquiry into the circumstances leading to the death of the person whose death is under inquiry and it is impossible to say that the Crown is a party to these proceedings even if it can be said that the accused is a party on the ground that he was during these proceedings a suspect.¹⁸

When all the available evidence relevant to the case has been recorded as stated above, the Court may proceed to examine the accused.

2. Examination of the accused.—

As regards the examination of the accused before the Committing Magistrate, see Notes *ante*, with reference to S. 287. The accused may be examined in Court before the Committing Magistrate and again before the Sessions Judge. The law in reference to such examination has been dealt with in S. 342. The Section runs thus :—

"S. 342 (1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

"(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them ; but the Court and the Jury (if any) may draw such inference from such refusal or answers as it thinks just.

"(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

"(4) No oath shall be administered to the accused."

On analysing the first clause of the Section, the following elements appear :—1st. There must be evidence taken before the accused is questioned ; 2nd. The evidence must disclose some circumstance which appears to go against him ; 3rd. The question may be put to enable

17. Jacob (1891) 19 C. 113.

18. Mahomed Yusuf (1932) 35 Bom L. R. 1020 :

35 Cr. L. J. 106 ; A. L. R. 1933 B. 479 ; 146 I. C. 544.

the accused to explain or account for any circumstance which seems to go against the accused ; 4th. Such questions may be put at any stage of the inquiry or trial ; 5th. Such questions may be put without previously warning the accused, which suggests that the accused shall not be given an opportunity to consult his pleader or Counsel before answering ; and 6th. It is obligatory on the Court to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence, and that too for the purpose of enabling him to explain the circumstances which appear in the evidence given on the side of the prosecution.

It should be remembered that at the very commencement of the trial before the Court of Session, the accused is first questioned upon the charge on which he has been sent up for trial, and that question is whether he is guilty or claims to be tried (S. 271). The answer to that question must be through his own mouth, and in answer he may or may not make a statement and the statement, if made, may amount to a plea of guilty or not guilty. In the course of that statement also the accused may give explanations bearing on the charge put forth against him (*See* Notes in Chapter II *ante*, bearing on S. 271). There is no such thing as examination of the accused then ; ¹⁹ only one question is put to find out whether the accused pleads guilty or claims to be tried. If he pleads guilty the case ends there, so far as he is concerned, and no trial takes place. If he does not plead, or refuses to plead, or volunteers to make a statement which does not amount to a full confession, or promises to file a written statement, the trial begins by the choosing of jurors or assessors, as the case may be. A statement or a promise to file a written statement made at the time of the plea in no way exonerates or exempts the Court from examining the accused at a later stage as required by S. 342,²⁰ though the Court is bound to record such statements in the manner indicated in S. 364.²¹ Voluntary admissions by the accused stand on a different footing from answers given by him to questions put by the Court in the course of his examination under S. 342. That Section does not prevent the accused from making them though under S. 58 of the Evidence Act, the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.²² During the Police investigation a Magistrate may record under S. 164 any voluntary statement made by the accused, but he cannot examine him as to the facts of the case.²³

(1) & (2). One of the fundamental principles of English Criminal law on which the Indian system is based is that the accused is presumed to be innocent until he is proved to be guilty. There is no such thing as cross-examination with a view to elicit evidence of guilt

19. Mahomed Rafique (1925) 43 C. L. J. 100, 102 : 27 Cr. L. J. 406 : A. I. R. 1926 C. 537 : 93 I. C. 70. *See* Bechu Lal (1926) 54 C. 286, 287 : 45 C. L. J. 8 : 28 Cr. L. J. 297 : A. I. R. 1927 C. 250 : 100 I. C. 377 ; Parmeshwar (1921) 23 Cr. L. J. 440 : A. I. R. 1922 P. 296 : 67 I. C. 616.

20. Promotha (1923) 50 C. 518 : 27 C.W.N. 383 : 24 Cr. L. J. 248 : A. I. R. 1923 C. 470 : 71 I. C. 792 ;

21. Fattah Chand (1897) 24 C. 499, 501 : 1 C. W. N. 435.

22. Leandro (1895) Rat. 769.

23. Gya Singh v. Soliman (1901) 5 C. W. N. 864.

against him. So, before he can be questioned, there must be evidence of some incriminating circumstance against him. The evidence referred to in Section 342 is the evidence already given at the trial when the Court puts questions to the accused.²⁴ And the evidence that was given must be legally admissible evidence. Where the accused was asked about a confessional statement or document which was not legally admissible or legally admitted; *held*, that the record of such examination could not be used in evidence against him.²⁵ A gap in the evidence for the prosecution cannot be filled up by any statement made by the accused in his examination.²⁶ Where a Magistrate, before evidence taken for the prosecution, put questions to the accused of the nature of a cross-examination, it was held that such a procedure was illegal.²⁷ In permitting a Sessions Judge to examine an accused person from time to time during a trial, the law does not contemplate that he should commence a trial with a strict examination of a prisoner after the manner of cross-examination of an adverse witness by Counsel.²⁸ The Court should bear in mind that one of the not the least important incidents in the administration of criminal justice "is to clear away every thing which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the administration of justice which is so essential to social order and security."²⁹ Where no evidence has been given by the prosecution, implicating the accused, the Magistrate has no right under the Code to put questions to the accused or invite him to make a statement; even if a statement is made by the accused in such circumstances, it is not admissible in evidence against the accused on his subsequent trial.³⁰ Where, in a prosecution for defamation, the prosecution has let in no evidence of publication by the accused, any statement of the accused admitting publication in his examination under S. 342 cannot be used to fill up the gap.³¹ The word "evidence" in S. 342 must be taken in the sense in which it is defined in the Evidence Act, and hence previous statements made by the accused and not recorded, as provided for by S. 164 and S. 364, cannot be admissible as "evidence given by witnesses against them."³²

(3) Next, the questions may be put to enable the accused to explain any circumstance appearing in evidence against him. The Sessions Court is not to establish a Court of

24. Hargobind (1892) 14 A. 242 : 12 A. W. N. 83.

25. Viran (1886) 9 M. 224 : 2 Weir 125 ; Basanta (1898) 26 C. 49.

26. Basanta (1898) 26 C. 49 ; Devi Dyal (1922) 4 L. 55 : 24 Cr. L. J. 693 : A. I. R. 1923 L. 225 : 73 I. C. 805 ; Mahadeo Singh (1925) 22 N. L. R. 1 : 27 Cr. L. J. 66 : A. I. R. 1925 N. 403 : 91 I. C. 242.

27. Hawthorne (1891) 13 A. 345 : 11 A. W. N. 102.

28. Hossein Buksh (1880) 6 C. 96 : 6 C. L. R. 521.

29. Sergeant v. Dale L. R. 2. Q.B.D. 558 [referred to in Hawthorne (1891) 13 A. 345 : 11 A. W. N. 102].

30. In re Abibulla (1915) 39 M. 770 : 16 Cr. L. J.

623 : 30 I. C. 447 ; Devi Dyal (1922) 4 L. 55 :

24 Cr. L. J. 693 : A. I. R. 1923 L. 225 : 73

I. C. 805 ; Bahawala (1925) 6 L. 183 : 26 Cr.

L. J. 1238 : A. I. R. 1925 L. 432 : 88 I. C.

854 ; Bhairab (1898) 2 C. W. N. 702, 708,

715, 716 ; Gya Singh v. Soliman (1901) 5

C. W. N. 864 ; Lal Sheikh (1899) 3 C. W. N.

387, 391

31. Devi Dyal (1922) 4 L. 55 : 24 Cr. L. J. 693 :

A. I. R. 1923 L. 225 : 73 I. C. 805.

32. Viran (1886) 9 M. 224, 239 : 2 Weir 125 ;

Nirmal Das (1900) 22 A. 445, 447 : 20-

A. W. N. 169 ; Abdul Gani (1925) 49 B. 878

889, 890 : 27 Cr. L. J. 114 : A. I. R. 1926 B.

71 : 91 I. C. 690.

Inquisition and to force a prisoner to convict himself by making some incriminating admissions after a series of searching questions, the exact effect of which he may not readily comprehend. The real object is to enable a Judge to ascertain, from time to time, from a prisoner, particularly if he is undefended, what explanation he may desire to offer regarding any fact stated by a witness, or after the close of the case, how he can meet what the Judge may consider to be damnable evidence against him. The minds of both the Judge and the Jury are at the outset prejudiced by irresponsible statements made by the accused while subject to this system of cross-examination before their guilt has been established by the examination of a single witness (conviction set aside and re-trial ordered).³³ The discretionary power given by law to examine a prisoner should be used to ascertain from him how he may explain facts in evidence appearing against him, not to drive him to make self-incriminating statements.³⁴ It is improper for a Judge to cross-examine him,³⁵ so as to extract from him an admission³⁶ or to prove a previous conviction.³⁷ In other words, it is not necessary to imitate the searching rigour of the French examination, but a series of relevant and carefully prepared questions is of the utmost importance as enabling an innocent man "to explain the circumstances appearing against him," and if the accused is guilty, as rendering his conviction more probable. The object of S. 342 is not to supplement the case for the prosecution, not to show that he is guilty, nor to drive him to make self-incriminating statements;³⁸ nor to prove a recorded admission when there is no legal evidence of it;³⁹ nor to elicit the name of his accomplices;⁴⁰ nor for ascertaining what witnesses he intends to call, or what evidence they will give, or what his defence is.⁴¹

The Section is for the benefit of the accused and also to enable the Court to discover

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| <p>33. Hossein Buksh (1880) 6 C. 96, 102 : 6 C. L. R. 521. See also <i>In re Chinibash</i> (1878) 1 C. L. R. 436; Mahadeo Singh (1925) 22 N. L. R. 1 : 27 Cr. L. J. 66, 67 : A. I. R. 1925 N. 403 : 91 I. C. 242.</p> <p>34. <i>Ex-parte Virabhadra</i> (1863) 1 M. H. C. R. 199 : 2 Weir 253; Behari Lal (1880) 6 C. L. R. 431; Kamandu (1886) 10 M. 121, 123, 125.</p> <p>35. Hurry Churn (1883) 10 C. 140 : 13 C. L. R. 358; Yakub (1883) 5 A. 253 : 3 A. W. N. 25; Sagal Samba (1893) 21 C. 642, 655, 656; Pandara (1900) 23 M. 636 : 2 Weir 253; Bhut Nath (1902) 7 C. W. N. 345; Anant Narayan (1900) 6 Bom. L. R. 94 : 1 Cr. L. J. 105; <i>In re Sadayan</i> (1908) 11 Cr. L. J. 193 : 4 I. C. 1126; Kheoraj (1908) 30 A. 540, 543 : 5 A. L. J. 505 : 8 Cr. L. J. 380; Tufani (1911) 15 C. L. J. 323 : 13 Cr. L. J. 283 : 14 I. C. 667; Haidar Ali (1912) 17 C. W. N. 354 : 14 Cr. L. J. 129 : 18 I. C. 881; Umar Din (1921) 2 L. 129 : 23 Cr. L. J. 388 : 67 I. C. 340; Niru (1922) 1 P. 630 : 24 Cr. L. J. 91 :</p> | <p>A. I. R. 1922 P. 582 : 71 I. C. 219; Rez Muhammad (1924) 26 Cr. L. J. 1510 : A. I. R. 1926 C. 424 : 90 I. C. 294; Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249.</p> <p>36. Umar Din (1921) 2 L. 129 : 23 Cr. L. J. 388 : 67 I. C. 340; Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249; Barhati (1923) 25 Cr. L. J. 426 : A. I. R. 1923 L. 539 : 77 I. C. 602.</p> <p>37. Yasin (1901) 28 C. 689 : 5 C. W. N. 670; Alloomiya (1903) 28 B. 129, 140, 152 : 5 Bom. L. R. 805 : 1 Cr. L. J. 227.</p> <p>38. Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249; Tufani (1911) 15 C. L. J. 323 : 13 Cr. L. J. 283 : 14 I. C. 667; Bhairab (1898) 2 C. W. N. 702, 716.</p> <p>39. Ganesh (1902) 4 Bom. L. R. 284, 288, 289.</p> <p>40. Kheoraj (1908) 30 A. 540, 543 : 5 A. L. J. 505 : 8 Cr. L. J. 380.</p> <p>41. Hargobind (1892) 14 A. 242 : 12 A. W. N. 63.</p> |
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the truth.⁴² The intention is that at a certain stage of the case the Court shall itself call on him to state in his own way anything he may desire, so that the Court may hear his defence from his own lips.⁴³ The object of the examination is to enable the accused to explain, in his own interest, the circumstances in the evidence against him, if he so likes.⁴⁴ The proof of the case against the prisoner depends for its support, not upon the absence or want of any explanation on the part of the prisoner himself, but upon the positive affirmative evidence of his guilt that is given by the Crown; if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspicion, he is called upon, for his own sake and his own safety, to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious appearances with perfect innocence.⁴⁵

4. The Court may put the questions at any stage. The first part of S. 342 is enabling and discretionary,⁴⁶ the object being to put, during the examination of the prosecution witnesses, questions necessary to obtain an explanation.⁴⁷ The Code of 1861, S. 373, did not justify the putting of any question to the accused in the midst of a trial.⁴⁸ It is legal and often desirable to put questions after the complainant's examination or before all the prosecution evidence is taken.⁴⁹

5. Such questions may be put without warning the accused. The intention is to put aside all Counsel and pleaders and call upon the accused solemnly to state in his own way anything he desires. What is necessary is that the accused shall be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock in order that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips.⁵⁰ Under the old Code of 1861, it was held in some cases that the Court should inform the accused that he was not bound to answer, though the answers were held to be admissible even if the warning was omitted.⁵¹ The words "without previously warning" were inserted in the Code of 1872, S. 193. They make it clear

42. Alimaddin (1924) 52 C. 522, 532 : 29 C. W. N. 231 : 41 C. L. J. 101 : 26 Cr. L. J. 631 : A. I. R. 1925 C. 361 : 85 I. C. 919.

43. Promotha (1923) 50 C. 518, 522, 523 : 27 C. W. N. 389 : 24 Cr. L. J. 248 : A. I. R. 1923 C. 470 : 71 I. C. 792 ; Motankhan (1926) 28 Cr. L. J. 417 : A. I. R. 1927 S. 175 : 101 I. C. 449.

44. Mahadeo Singh (1925) 22 N. L. R. 1 : 27 Cr. L. J. 66 : A. I. R. 1925 N. 403 : 91 I. C. 242 ; In re Kannammal (1925) 27 Cr. L. J. 311 : A. I. R. 1926 M. 570 : 92 I. C. 695 ; Rameshar (1925) 26 Cr. L. J. 927 : A. I. R. 1925 P. 723 : 86 I. C. 991 ; Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1926 S. 116 : 81 I. C. 249 ; Barhati (1923) 25 Cr. L. J. 426 : A. I. R. 1923 L. 539 : 77 I. C. 602.

45. Amritlal (1915) 42 C. 957 : 19 C. W. N. 676 : 21 C. L. J. 331 : 16 Cr. L. J. 497 : 29 I. C. 513.

46. Raghu (1920) 5. P. L. J. 430 : 21 Cr. L. J. 705 : 58 I. C. 49.

47. Mohammad Nasiruddin (1925) 4 P. 459, 465 : 26 Cr. L. J. 954 : A. I. R. 1925 P. 713 : 87 I. C. 106.

48. Diaz (1866) 3 Bom. H. C. R. 51, 53.

49. Dinu (1921) 16 S. L. R. 201 : 26 Cr. L. J. 191 : 83 I. C. 895.

50. Promotha (1923) 50 C. 518, 522, 523 : 27 C. W. N. 389 : 24 Cr. L. J. 248 : A. I. R. 1923 C 470 : 71 I. C. 792.

51. Dinoo (1871) 16 W. R. 21.

that such a warning is not necessary. Compare S. 29 of the Evidence Act which says that a confession otherwise relevant does not become irrelevant merely because the person making the confession was not warned that he was not bound to make such a confession.

6. The last part of S. 342 (1) makes it obligatory on the part of the Court to question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. Sub-s. (1) of S. 289 requires that after the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded the accused shall be asked whether he means to adduce evidence. The accused is not then called on for his defence, he is called on for defence only under the circumstances mentioned in Sub-s. (4) of S. 289. The 'examination' mentioned in Sub-s. (1) cannot therefore possibly be an examination under the last part of S. 342. And as on the face of the Code every reference to any examination of the accused is to S. 342 (it is presupposed in Chaps. XVIII and XX to XXIII, and applies to all cases in the absence of an express or implied exception),⁵² the 'examination' mentioned in that Sub-section should refer to the first part of S. 342, and this is suggested by the words 'if any' within brackets. Again, there may not be any examination at all, if there was no circumstance appearing in evidence against the accused so as to call for an explanation from him; and asking the accused 'whether he means to adduce evidence' does not presuppose that there is evidence against the accused, as Sub-sections (2) and (3) clearly indicate. It is submitted, therefore, that Sub-s. (1) of S. 289 does not necessarily control S. 342 as has been held in one case;⁵³ for it may be quite consistent with the first part of S. 342. In a Sessions trial, the accused is called on to enter on his defence when the Court considers that there is evidence that the accused has committed the offence (S. 289 (4)). When, therefore, the Court, after examining the witnesses for the prosecution and considering it desirable to give the accused an opportunity to explain any circumstance appearing in evidence against him (which is quite discretionary on its part), puts some questions to the accused, and after getting answers from him or not, still considers that there is evidence against him and thereupon decides to call on the accused to enter on his defence, it must, before doing so, examine the accused generally on the case under the last part of S. 342 (1). The phrase "called on for his defence" in S. 342 means the same thing as the phrase "called on to enter on his defence".⁵⁴ It does not mean that the accused is called on to produce his defence witnesses, for he may be called on to enter on his defence even though he says that he does not mean to adduce evidence. (See Sub-s. (4) of S. 289). This view is confirmed by the decision in the case of *Raghu v. K. E.*⁵⁵ which has held that the

52. *Bechu Lal* (1926) 54 C. 286, 295, 296 : 45 C. L. J. 8 : 28 Cr. L. J. 297 : A. I. R. 1927 C. 250 : 100 I. C. 377.

53. *Khudiram* (1908) 9 C. L. J. 55 : 10 Cr. L. J. 325 : 3 I. C. 625 (dissented from in *Raghu* (1920) 5 P. L. J. 430 : 21 Cr. L. J. 705 : 58 I. C. 49]

54. *Dibakanta v. Gour Gopal* (1923) 50 C. 939 : 27 C. W. N. 743 : 25 Cr. L. J. 27 : A. I. R. 1923 C. 727 : 75 I. C. 715 ; *Raghu* (1920)

5 P. L. J. 430 : 21 Cr. L. J. 705 : 58 I. C. 49 ; *Motankhan* (1926) 28 Cr. L. J. 417 : A. I. R. 1927 S. 175 : 101 I. C. 449 ; *Nathu* (1924) 50 B. 42 : 26 Cr. L. J. 690 : A. I. R. 1925 B. 170 : 86 I. C. 66 (relying on *In re Varisai Rowther* (1922) 46 M. 449 (F. B.) : 24 Cr. L. J. 547 : A. I. R. 1923 M. 609 : 73 I. C. 163.

55. *Raghu* (1920) 5 P. L. J. 430, 435, 436, 442, 443 : 21 Cr. L. J. 705 : 58 I. C. 49.

last part of S. 342 (1) applies to the stage indicated in S. 289 (4). The provision contained in the last part of S. 342 (1) is thus mandatory and it is essential that that procedure should be adopted as there are many cases in which it is the only opportunity the accused has of explaining things which might otherwise be allowed to be taken without any explanation at all; omission to do so is an irregularity which vitiates the trial.⁵⁶ The trial becomes illegal from the moment when, without compliance with S. 342, the Magistrate calls upon the accused to enter on their defence.⁵⁷ It is no compliance with S. 342 to examine the accused after the accused has entered on his defence,⁵⁸ or to examine him before the stage in the trial prescribed in the Section and there was no examination at that stage.⁵⁹ Where there are several accused, the omission to examine each of the accused separately is an illegality. The Court is not absolved from its duty because it has examined the accused under the first part of the section S. 342 (1),⁶⁰ or because of his having been examined by the Committing Magistrate.⁶¹ A contrary view has been taken by some of the other High Courts⁶² which have held that omission to examine the accused further is a mere irregularity which does not vitiate the trial in the absence of prejudice. The effect of non-compliance with the requirements of S. 342 depends on the question whether the proceedings have resulted in a miscarriage of justice.⁶³

56. *Fatu Santal* (1921) 6 P. L. J. 147: 22 Cr. L. J. 417: 61 I. C. 705; *Mitarjit* (1921) 6 P. L. J. 644: 22 Cr. L. J. 697: 63 I. C. 825; *Bajjnath* (1923) 1923 P. 96: 24 Cr. L. J. 311: A. I. R. 1923 P. 292: 72 I. C. 71; *Haro Nath* (1922) 28 C. W. N. 119: 38 C. L. J. 281: 25 Cr. L. J. 289: A. I. R. 1924 C. 182: 76 I. C. 961; *Satish* (1924) 51 C. 924: 39 C. L. J. 411: 26 Cr. L. J. 15: A. I. R. 1924 C. 975: 83 I. C. 495; *Nathu* (1924) 50 B. 42: 26 Cr. L. J. 690: A. I. R. 1925 B. 170: 86 I. C. 66; *Muhammad Sadiq* (1925) 26 Cr. L. J. 1370: A. I. R. 1926 L. 51: 89 I. C. 458; *Nani Mandal* (1924) 52 C. 403: 41 C. L. J. 50: 26 Cr. L. J. 761: A. I. R. 1925 C. 575: 86 I. C. 345; *Nga Po* (1926) 4 R. 361: 27 Cr. L. J. 1364: A. I. R. 1927 R. 19: 98 I. C. 484; *Tilak v. Bhaya* (1921) 22 Cr. L. J. 598: 62 I. C. 870.
57. *Promotha* (1923) 50 C. 518: 27 C. W. N. 389: 24 Cr. L. J. 248: A. I. R. 1923 C. 470: 71 I. C. 792.
58. *Surendra v. Ismaddi* (1924) 51 C. 933: 26 Cr. L. J. 269: A. I. R. 1925 C. 480: 84 I. C. 325.
59. *Nathu* (1924) 50 B. 42: 26 Cr. L. J. 690: A. I. R. 1925 B. 170: 86 I. C. 66.

60. *Raghu* (1920) 5 P. L. J. 430: 21 Cr. L. J. 705: 58 I. C. 49; *Ramnath* (1921) 22 Cr. L. J. 460: 61 I. C. 844; *Mazahar Ali* (1922) 50 C. 223: 27 C. W. N. 99: 36 C. L. J. 417: 24 Cr. L. J. 198: A. I. R. 1923 C. 196: 71 I. C. 662.
61. *Raju* (1907) 9 Bom. L. R. 730: 6 Cr. L. J. 74; *Basapa* (1915) 17 Bom. L. R. 892: 16 Cr. L. J. 765: 31 I. C. 365; *Raghu* (1920) 5 P. L. J. 430, 445: 21 Cr. L. J. 705: 58 I. C. 49. *Contra*, *Khudiram* (1908) 9 C. L. J. 55, 70, 71: 10 Cr. L. J. 325: 3 I. C. 625.
62. *Ganga* (1924) 26 Cr. L. J. 132: A. I. R. 1924 A 763: 83 I. C. 692; *Mohiuddin* (1925) 4 P. 488: 26 Cr. L. J. 811: A. I. R. 1925 P. 414: 86 I. C. 459 [dissenting from *Mitarjit* (1921) 6 P. L. J. 644: 22 Cr. L. J. 697: 63 I. C. 825]. See *In re Varisai Rowther* (1922) 46 M 449: 24 Cr. L. J. 547: A. I. R. 1923 M 609: 73 I. C. 163; *Pitam* (1931) 9 O. W. N. 116: 33 Cr. L. J. 811: A. I. R. 1932 O 113: 139 I. C. 636.
63. *Nga Po* (1932) 10 R. 511 (F. B.): 34 Cr. L. J. 121: A. I. R. 1932 R. 190: 141 I. C. 89 [following *Erman Ali* (1929) 57 C. 1228 (F. B.): 34 C. W. N. 296: 51 C. L. J. 171: 31 Cr. L. J. 536: A. I. R. 1930 C 212: 123 I. C. 664].

A written statement of defence cannot be allowed to take the place of an examination of the accused person, it cannot relieve the Court of its duty to comply with the imperative requirements of the law under S. 342.⁶⁴ There is no provision in the Code for the making of a written statement by an accused in the Sessions Court, and the practice of refusing to answer questions and of putting in a written statement is a permissive one.⁶⁵ The promise, at the time of the plea, to file such a statement does not absolve the Court from the obligation to examine the accused.⁶⁶ A written statement accepted from the accused does not take the place of evidence nor of such examination of the accused as is contemplated by the Code.⁶⁷ It has been held, however, that where the accused has filed a written statement not only after the prosecution evidence was over but also after the defence witnesses were examined, cross-examined and discharged, there is no ground for interference in revision, if the accused was not examined under S. 342, as no miscarriage of justice had taken place and the accused was not prejudiced.⁶⁸ When the accused refuses to answer and says he will file or has filed a written statement, the Court is not bound to keep on asking questions, especially when it is filed at the time.⁶⁹ The Section contemplates the examination of an accused willing to answer.⁷⁰ If he does not wish to answer orally, the written statement may be taken as an answer to the question.⁷¹

A Judge has the right to refuse to allow a prisoner on his defence making a statement irrelevant to the issue or subversive of law.⁷²

This compulsory examination is to take place after all the witnesses for the prosecution have been examined, cross-examined and re-examined. Where one witness for the prosecu-

64. Harnama (1921) 22 Cr. L. J. 276 : 60 I. C. 676 ; Moinuddin (1921) 22 Cr. L. J. 442 : 61 I. C. 794 ; In re Nainamalai (1921) 23 Cr. L. J. 637 : 69 I. C. 377 ; Mazhar Ali (1922) 50 C. 223 : 27 C. W. N. 99 : 35 C. L. J. 417 : 24 Cr. L. J. 198 : A.I.R. 1913 C. 196 : 71 I. C. 652 ; Balkeshwar (1922) 23 Cr. L. J. 114 : A. I. R. 1922 P. 5 : 65 I. C. 546 ; Nataraja v. Devasigamani (1930) 1930 M. W. N. 914 : 32 Cr. L. J. 757 : A.I.R. 1931 M. 241 : 131 I. C. 493.
65. Dwijendra (1915) 19 C. W. N. 1043, 1054 : 16 Cr. L. J. 724 : 31 I. C. 164 ; Ring (1929) 53 B. 479 : 31 Cr. L. J. 65 : A. I. R. 1929 B. 296 : 120 I. C. 340 ; Taraknath (1935) 33 C. W. N. 1309 : 37 Cr. L. J. 30 : A. I. R. 135 C. 687 : 159 I. C. 149.
66. Promotha (1923) 50 C. 518 : 26 C. W. N. 389 : 24 Cr. L. J. 248 : A. I. R. 1923 C. 470 : 71 I. C. 792.
67. Amritlal (1915) 42 C. 957 : 19 C. W. N. 676 : 21 C. L. J. 331 : 16 Cr. L. J. 497 : 29 I. C. 513.
68. Mir Tilawan (1921) 1 P. 31 : 23 Cr. L. J. 703 : A. I. R. 1922 P. 388 : 69 I. C. 38. *See also* Mohiuddin (1925) 4 P. 488, 494, 501 : 26 Cr. L. J. 811 : A. I. R. 1925 P. 414 : 86 I. C. 459.
69. Bhagwat Singh (1924) 4 P. 231 : 26 Cr. L. J. 932 : A. I. R. 1925 P. 378 : 85 I. C. 996 ; Harnama (1921) 22 Cr. L. J. 276 : 60 I. C. 676 ; Harjivan (1925) 50 B. 174 : 27 Cr. L. J. 1335 : A. I. R. 1926 B. 231 : 98 I. C. 407. *See* Alimuddin (1924) 52 C. 522, 542 : 29 C. W. N. 231 : 41 C. L. J. 101 : 26 Cr. L. J. 631 : A. I. R. 1925 C. 361 : 85 I. C. 919.
70. Harjivan (1925) 50 B. 174, 179 : 27 Cr. L. J. 1335 : A. I. R. 1926 B. 231 : 98 I. C. 407.
71. In re Varisai Rowther (1922) 46 M. 449, 473, (F. B.) : 24 Cr. L. J. 547 : A. I. R. 1923 M. 609 : 73 I. C. 163 ; Mohiuddin (1925) 4 P. 488 : 26 Cr. L. J. 811 : A. I. R. 1925 P. 414 : 86 I. C. 459 ; Hasham (1935) 37 Cr. L. J. 428 : A. I. R. 1936 L. 28 : 161 I. C. 344.
72. Dunn (1922) 17 Cr. A. R. 12.

tion was examined subsequent to the examination of the accused, it was held that the trial was vitiated.⁷³ The examination of witnesses cannot be said to have concluded until they have also been cross-examined. So when after the examination-in-chief of the prosecution witnesses the accused was questioned by the Court but he was not questioned after their cross-examination was finished, the provisions of S. 342 have not been complied with and the conviction is illegal; the trial should be held again and continued from the point at which there should have been an examination of the accused under S. 342.⁷⁴ Where after the arguments had commenced, one prosecution witness was recalled and some questions were put to him, the mere fact that formalities of asking the accused some questions under S. 342 were not gone through, was held not to have vitiated the trial.⁷⁵

This mandatory examination must be for the same purpose as under the first part of S. 342 (1), viz, to explain the circumstances appearing in evidence against him.⁷⁶ See Notes *ante*, under para marked (3).

Where the only circumstance appearing in evidence against the accused was his retracted confession, it was a grave omission on the part of the Judge not to question the accused (as he was required by S. 342 to do) for the purpose of enabling him to explain his having made the confession. The question, "What offence are you going to confess", was held to be an improper form of question to an accused person.⁷⁷

The Court must ask the question directly of the accused and not of his pleader.⁷⁸ The Section contemplates an individual examination of all the accused, and a joint statement taken from all the various accused persons is not a compliance with the requirements of the

73. Rameshwar (1921) 2 P. L. J. 741 : 22 Cr. L. J. 259 : 60 I. C. 659 ; Tilak Gope v. Bhayaram (1921) 22 Cr. L. J. 598 (P) : 62 I. C. 870 ; Mazahar Ali (1922) 50 C. 223 : 27 C. W. N. 99 : 36 C. L. J. 417 : 24 Cr. L. J. 198 : A. I. R. 1923 C. 196 : 71 I. C. 622 ; Gulzari (1922) 49 C. 1075 : 39 C. L. J. 31 : 24 Cr. L. J. 3 : A. I. R. 1923 C. 164 : 71 I. C. 51 ; Kashi v. Damu (1921) 27 C. W. N. 28 : 25 Cr. L. J. 524 : 77 I. C. 988 ; Sailendra (1923) 38 C. L. J. 175 : 25 Cr. L. J. 460 : A. I. R. 1924 C. 153 : 77 I. C. 812 ; Hamid v. Sriksen (1922) 28 C. W. N. 118 : 37 C. L. J. 413 : 24 Cr. L. J. 943 : 75 I. C. 367 ; Nataraja v. Devasigamani (1930) 1930 M. W. N. 914 : 32 Cr. L. J. 757 : A. I. R. 1931 M. 241 : 131 I. C. 433 ; Rihan (1932) 34 Cr. L. J. 161 : A. I. R. 1932 S. 165 : 141 I. C. 529. *Contra* In re Varisai Rowther (1922) 46 M. 449 (F. B.) : 24 Cr. L. J. 547 : A. I. R. 1923 M. 609 : 73 I. C. 163 ; Byrne (1922) 4 L. 61 : 25 Cr. L. J. 801 : A. I. R. 1924 L. 84 : 81 I. C. 337 ; Bechu (1922) 45 A. 124 : 24 Cr. L. J. 67 : A. I. R. 1923 A. 81 : 71 I. C. 115.

74. Jumnon (1922) 50 C. 303 : 25 Cr. L. J. 799 : A. I. R. 1923 C. 658 : 81 I. C. 319 ; Dibakanta v. Gour Gopal (1923) 50 C. 939 : 27 C. W. N. 743 : 25 Cr. L. J. 27 : A. I. R. 1923 C. 727 : 75 I. C. 715 (per Cuming, J.) ; Sailendra (1923) 38 C. L. J. 175 : 25 Cr. L. J. 463 : A. I. R. 1924 C. 153 : 77 I. C. 812 ; Moharrum Mahammad (1931) 32 Cr. L. J. 623 : 130 I. C. 845 (C) ; Tej Ram (1933) 35 Cr. L. J. 104 : A. I. R. 1933 L. 10.2 : 146 I. C. 434 ; Hooghly-Chinsurah Municipality v. Keshab (1931) 56 C. L. J. 583 : 34 Cr. L. J. 519 : A. I. R. 1933 C. 347 : 143 I. C. 285.

75. Dharani (1932) 57 C. L. J. 57 : 35 Cr. L. J. 226 : A. I. R. 1933 C. 594 : 146 I. C. 1051.

76. Mohammad Nasiruddin (1925) 4 P. 459, 466 : 26 Cr. L. J. 954 : A. I. R. 1925 P. 713 : 87 I. C. 106.

77. Cholakel (1886) 2 Weir 507.

78. Promotha (1923) 50 C. 518, 522 : 27 C. W. N. 389 : 24 Cr. L. J. 248 : A. I. R. 1923 C. 470 : 71 I. C. 792 ; Meser Bepari (1925) 29 C. W. N. 939, 940 : 26 Cr. L. J. 1032 : A. I. R. 1926 C. 430 : 87 I. C. 920.

Section. It is an illegality vitiating the trial and the consequent conviction.⁷⁹ S. 342 is restricted to the accused who is on trial, it cannot apply to a convicted person (who has already pleaded guilty) ; such a person can give evidence in the proceeding.⁸⁰ When the accused says that his statement is the same as of that of his co-accused, and the co-accused has made two contradictory statements and no question is put to the accused to ascertain which of the two contradictory statements made by the co-accused was true, the accused is entitled to the benefit of the statement beneficial to him.⁸¹

3. Meaning of the expression, "Question him generally on the case."

The following extract from the Report of the Select Committee on the Bill of Act X of 1882 clearly shows the object of the Legislature in inserting the words, "For the purpose of enabling the accused" etc. :—

"We think that the present law gives too great a latitude to the Courts with regard to the examination of an accused person. The object of such an examination is to give the accused an opportunity of explaining any circumstances which may tend to criminate him, and thus to enable the Court, in cases where the accused is undefended, to examine the witnesses in his interest. It was never intended that the Court should examine the accused with a view to elicit from him some statement which would lead to his conviction. We have, therefore, limited the power of interrogating the accused by adding to the first paragraph the words 'for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him.' We think the accused shall always have this opportunity of explaining and we have, therefore, required the Court to question him generally for that purpose before he enters on his defence."

The first portion of S. 342(1) is thus meant to be confined to questions, more or less of specific nature, so that by the accused's explanation the Court may be enabled to examine or cross-examine a witness who has given evidence against the accused, in the interest of the accused, especially when he is undefended. The Court need not do so when it finds that the accused is being properly defended. When all the evidence for the prosecution is finished and the whole case is before the Court, the Court is required to ask the accused generally on the case as made out against him and it need not confine itself to specific questions as to what this witness or that witness has said. The Court must do it keeping this object in view that it is for the benefit of the accused and to enable him to have an opportunity of explaining the circumstances going against him (*See Notes ante*, under para marked 3). How the questions are to be framed depends on the circumstances of each case. When the accused is undefended, the elements of the evidence demanding explanation should be pointed out to him,⁸² but the High Court would not enquire in Revisional Jurisdiction into the sufficiency of the examination in a case where he has been defended by a pleader, except

79. Balkrishna (1930) 55 B. 356 : 32 Cr. L. J. 572 : A. I. R. 1931 B. 132 : 130 I. C. 577.

80. Muhammad Yusuf (1931) 58 C. 1214 : 35 C. W. N. 490 : 32 Cr. L. J. 667 : A. I. R. 1931 C. 341 : 131 I. C. 142.

81. Rihan (1932) 34 Cr. L. J. 161 : A. I. R. 1932 S. 165 : 141 I. C. 529.

82. Panchu (1921) 23 Cr. L. J. 233 : A. I. R. 1923 P. 91 : 66 I. C. 73.

possibly in very exceptional and special circumstances. (This distinction has been criticised in *E. v. Alimuddin* (1924) 52C. 522, 538. See *post*). Similarly, if the accused be an ignorant person, the main points of the damning evidence should be clearly made known to him and the Court should not be satisfied with putting vague questions to him.⁸³ There is, however, some difference of opinion in the judicial interpretation of the words, "question him generally on the case". In some cases it has been held that the object of S. 342 being to enable the accused to explain each and every circumstance appearing in evidence against him, the accused is not afforded any reasonable opportunity of clearing up the case by such a question as, "You have heard the evidence, what have you to say"; the specific points or points which weigh against him must be mentioned, for if this is not done he cannot be reasonably expected to be able to explain it or them.⁸⁴ The mere asking the accused as to whether he had anything further to say is not sufficient compliance with the second part of S. 342 (1), the question must be framed in such a way as to enable the accused to know what he is to explain, as to what are the circumstances which are against him and for which an explanation is needed⁸⁵, or what, in the opinion of the Court, are the circumstances against him.⁸⁶ Where the accused were once examined before the examination of all the prosecution witnesses and they made a statement, and thereafter, at the close of the case for the prosecution and before calling for the defence, the only record of the examination consisted of these words "Plea-Not Guilty": *Held*, that there was no substantial compliance with S. 342.⁸⁷ In the examination in the trial before the Sessions Court, merely reading to the accused the statement before the Committing Magistrate, without questioning him on the prosecution evidence and directing his attention to any part of it requiring his explanation is an omission to examine and an illegality.⁸⁸ The Judge should ascertain from the prisoner his explanation of his presence at the scene of the crime, and an innocent person cannot injure himself by a truthful explanation of the circumstances appearing in the evidence against him.⁸⁹ The Judge should enquire from the prisoner his knowledge of the poison administered and his explanation of the relevant portions of the retracted confession,⁹⁰ or of apparently contradictory statements,⁹¹ or of his admission of having buried the stolen property.⁹²

83. Tani (1918) 20 Cr. L. J. 12 : 48 I. C. 487 (N). See also *Durga Ram* (1924) 26 Cr. L. J. 716 : A. I. R. 1925 P. 342 : 86 I. C. 156 ; *Shamlal* (1924) 26 Cr. L. J. 572 : A. I. R. 1925 C. 980 : 85 I. C. 716.

84. *Maung Hman* (1923) J. R. 689 : 25 Cr. L. J. 487 : A. I. R. 1924 R. 172 : 77 I. C. 887.

85. *Bhokhari Singh* (1923) 1924 P. 198 : 25 Cr. L. J. 711 : A. I. R. 1924 P. 791 : 81 I. C. 199.

86. *Durga Ram* (1924) 26 Cr. L. J. 716 : A. I. R. 1925 P. 342 : 86 I. C. 156 [dissenting from *Mir Tilawan* (1921) 1 P. 31 : 23 Cr. L. J. 703 : A. I. R. 1922 P. 388 : 69 I. C. 383].

87. *Sailendra* (1923) 38 C. L. J. 175 : 25 Cr. L. J. 460 : A. I. R. 1924 C. 153 : 77 I. C. 812.

88. *Fatu Santal* (1921) 6 P. L. J. 147, 162 : 22 Cr. L. J. 417 : 61 I. C. 705 ; *Raghu Bhumi* (1920) 5 P. L. J. 430 : 21 Cr. L. J. 705 : 58 I. C. 49.

89. *Nagendra* (1915) 19 C. W. N. 923 : 21 C. L. J. 396 : 16 Cr. L. J. 576 : 30 I. C. 128.

90. *Bhagi* (1886) Rat. 242, 243.

91. *Puran* (1899) 19 A. W. N. 39, 40.

92. *Sogai Muthu* (1925) 50 M. 274, 299 : 27 Cr. L. J. 394 : A. I. R. 1926 M. 638 : 93 I. C. 42.

In *E. v. Narayan*⁹³ it has been held that under S. 342 it is incumbent on the Court to ask the accused generally whether he wishes to offer an explanation of any of the evidence which has been given against him ; and if the Court does so, that would be a sufficient compliance with the Section ; the Section also gives the Court power to put specific questions to the accused with regard to any of the evidence adduced for the prosecution ; but it is left entirely to the discretion of the Courts whether they should, after having put the general question, ask specific questions on particular points in the evidence. In *In re Murthi Naikan*⁹⁴ it was held that the proper way to examine the accused was to tell him that he is charged with a certain offence and ask him if he has any explanation thereof and wishes to make any statement. In *Shamlul Sing V. E.*⁹⁵ it was held that the proper method of applying S. 342 is to bring to the attention of the accused specific matters which appear in the evidence against him ; merely questioning him generally as to whether he has anything to say or anything to add to what he has said before the Committing Magistrate is not a satisfactory method of applying the Section ; while in *Rez Muhammad V. E.*⁹⁶ where all the accused were asked the same question namely "What is your defence", and each of the accused replied "I am innocent", it was held that there was a sufficient compliance with the Section.

In *E. v. Alimuddin*,⁹⁷ Mukerji, J. took a long view of S. 342. In his opinion the Section is not intended merely for the benefit of the accused ; it is a part of a system for enabling the Court to discover the truth, and it may happen that the explanation of the accused or his failure to explain is the most incriminating circumstance against him ; the result of the examination may benefit the accused, if a satisfactory explanation is offered by him ; it may, however, be injurious to him, if no explanation or a false explanation is given ; the Court should, therefore, not only have the power to point out to the accused the circumstances appearing in the evidence which require explanation, but it must exercise that power in such a way that the accused may know what points, in the opinion of the Court, require explanation, failure or refusal to give which will entitle the Court to draw an inference against him. He has accordingly held that the word "generally" does not limit the nature of the questioning to one or more questions of a general nature relating to the case but that it means that the questions should relate to the whole case generally and should not be limited to any particular part or parts of it, that the Court should always frame questions dealing with such salient points in a case, as in its opinion call for explanation, taking every precaution not to entrap the accused to make incriminating answers and avoiding all questions in the nature of cross-examination : the incompetency of a tribunal in administering the law or the

93. (1923) 26 Bom. L. R. 109 : 25 Cr. L. J. 1127 : A. I. R. 1924 B. 334 : 81 I. C. 951.

94. (1886) 2 Weir 438.

95. (1924) 26 Cr. L. J. 572 : A. I. R. 1925 C. 980 : 85 I. C. 716.

96. (1924) 26 Cr. L. J. 1510 : A. I. R. 1926 C. 424 : 90 I. C. 294 [dissenting from Bhokhari

Singh (1923) 1924 P. 193 : 25 Cr. L. J. 711 : A. I. R. 1924 P. 791 : 81 I. C. 199]

97. (1924) 52 C. 522 : 29 C. W. N. 231 : 41 C. L. J. 101 : 26 Cr. L. J. 631 : A. I. R. 1925 C. 361 : 86 I. C. 919 [Mukerji, J. dissented from Rez Muhammad (1924) 26 Cr. L. J. 1510 : A. I. R. 1926 C. 424 : 90 I. C. 294, while Newbould, J. approved it]

difficulty in administering it, is no ground for whittling down its provisions. On the other hand, Newbould, J. held that what is necessary under S. 342 is that the accused should be brought face to face solemnly with an opportunity given to him to make a statement from his place in the dock, in order that the Court may have the advantage of hearing his defence, if he is willing to make one, with his own lips ; that a formal question in general terms which gives the accused an opportunity of making a statement of his defence with his own lips, for instance, the question "What is your defence", is a sufficient compliance with the mandatory provisions of S. 342, since it enables the accused to explain any circumstance appearing in the evidence against him ; that whether the Court should put further questions depends on the facts in each case ; if it appears from the cross-examination that he understood the facts requiring explanation, they need not be repeated.

In *Mahammad Nasiruddin v. E.*,⁹⁸ it has been held that it is impossible to lay down any hard and fast rule as to the nature of the examination of the accused, that it is not necessary nor is it desirable to examine the accused at great length or to force him to disclose his defence, so as to enable the prosecution to take advantage of it when the witnesses for the accused are examined.

Thus, different views have been held by the different High Courts and even by the same High Court. The nature in which the questions are to be framed very often depends upon the nature of the case and the way in which it is being conducted. Questioning the accused generally on the case does not mean that the Court should put specific questions to him or discuss the case with him⁹⁹, and in some cases formal questions in general terms may be a sufficient compliance with the mandatory provisions of S. 342.¹⁰⁰ In a complicated case it will be entirely insufficient to put a general question asking the accused what he had to say in explanation of the evidence against him. Where a large number of documents on which the prosecution mainly relies are obscure in themselves and capable of more than one explanation, the accused should be asked what their explanations are of the doubtful passages ; there should be some examination of the accused as to the contents of some of the more important documents.¹⁰¹ The duty imposed on a Session Judge to comply with S. 342 is a very difficult one, and has to be performed with the greatest caution so that without the slightest flavour of cross-examination, without asking anything which may lead the accused to incriminate himself, the important points against him may be brought to his notice and he may have an opportunity of explaining them ; the task is such a difficult one that when the accused is represented by Counsel it is often in his

98. (1925) 4 P. 459 : 26 Cr. L. J. 954 : A. I. R. 1925 P. 713 : 87 I. C. 106. See also *Mohiuddin* (1925) 4 P. 483, 497 : 26 Cr. L. J. 811 : A. I. R. 1925 P. 414 : 86 I. C. 452.

99. In *re Ramaswami* (1926) 28 Cr. L. J. 383 : A. I. R. 1927 M. 613 : 100 I. C. 991.

100. *Wasudeo* (1925) 27 Cr. L. J. 181 : A. I. R. 1927 N. 71 : 91 I. C. 997 [following *Newbould, J.* in *Alimuddin* (1924) 52 C. 522 : 29 C. W. N. 231 : 41 C. L. J. 101 : 26 Cr. L. J. 631 : A. I. R. 1925 C. 361 : 85 I. C. 919]

101. *Maung Ba Chit* (1928) 7 R. 821 : 31 Cr. L. J. 387 : A. I. R. 1930 R. 114 : 122 I. C. 273.

interest that the Judge should formally comply with the Section by asking a general question and then leave the accused's Counsel to offer explanation on his behalf in the way most favourable and least dangerous to him.¹⁰² The Privy Council has held¹⁰³ that under S. 342 it is the duty of the Court before drawing an adverse inference against the accused on any point to call his attention to it and ask for an explanation; where the Judge fails to do so the accused can not be said to have failed to explain and no adverse inference can be drawn against him. This decision of the Privy Council tends to support the view that the questioning should relate to the whole case generally, and should not be confined to one or more questions of a general nature relating to the case, to give proper effect to the intention and scope of S. 342. The questioning is not meant to be a lengthy cross-examination as regards all evidence produced by the prosecution; it is only to enable the accused to explain any evidence against him. And the accused must confine himself to relevant answers to the questions asked by the Court. The Judge has power to refuse to record irrelevant answers, and, if necessary, may prevent the accused making lengthy irrelevant answers.¹⁰⁴

In this connection S. 18 of Stat. 11 and 12 Vic, Ch. 42 may be compared. It says that the justices shall say to the accused these words or words to the following effect:— "Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you on your trial. You have nothing to hope from any promise of favour and nothing to fear from any threat which may have been held out to you, but whatever you now say may be given in evidence against you on your trial, notwithstanding such promise or threat".

4. Sub-s. (2) of S. 342.—

The accused is not bound to answer the questions put by the Court; he has a right to decline to answer.¹⁰⁵ An innocent person cannot injure himself by a truthful explanation and a failure even to offer evidence is unwise.¹⁰⁶

Refusal to answer is not an offence under the Indian Penal Code, S. 170; ¹⁰⁷ or of Bombay Act VIII of 1867, S. 15.¹⁰⁸

102. In re Kallam Narayana (1932) 55 M. 231 : 34 Cr. L. J. 481 : A. I. R. 1933 M. 233 : 143 I. C. 46.

103. Dwarkanath (1933) 37 C. W.N. 514 (P.C.) : 57 C. L. J. 177 : 35 Bom. L. R. 507 : 64 M. L. J. 466 : 1933 A. L. J. 645 : 34 Cr. L. J. 322 : A. I. R. 1933 P. C. 124 : 142 I. C. 335. *See also* Sohan Lal (1933) 10 O. W. N. 678 : 34 Cr. L. J. 568 : A. I. R. 1933 O. 305 : 143 I. C. 467.

104. Jhabwala (1933) 1933 A. L. J. 799 : 34 Cr. L. J. 967 : A. I. R. 1933 A. 690 : 145 I. C. 481.

105. Harjivan (1925) 50 B. 174, 179 : 27 Cr. L. J. 1335 : A. I. R. 1926 B. 231 : 98 I. C. 407 ; In re Kannammal (1925) 27 Cr. L. J. 311 : A. I. R. 1926 M. 570 : 92 I. C. 695.

106. Nogendra (1915) 19 C. W. N. 923 : 21 C. L. J. 396, 406 : 16 Cr. L. J. 576 : 30 I. C. 128.

107. In re Thirumala (1923) 47 M. 395 : 25 Cr. L. J. 374 : A. I. R. 1924 M. 540 : 77 I. C. 422.

108. Ravji (1892) Rat. 610 ; Jayapa (1899) 1 Bom. L. R. 435.

Refusal to sign the record of the examination is not an offence under the Indian Penal Code, S. 180.¹⁰⁹

S. 342 applies only to oral examination, and does not prohibit a direction to the accused to take his finger-marks in Court.¹¹⁰ His finger-prints may also be taken under Act XXXIII of 1920 for comparison by an expert.¹¹¹ The prisoner's body cannot be medically examined by a doctor without his consent for the purpose of qualifying some medical witness to give medical examination in the case against him.¹¹²

The non-liability to punishment for giving false answers is limited to answer questions by the Court and does not apply to the accused's written statements.¹¹³ Relevant statements under S. 342 or in written statements are not absolutely privileged in a prosecution under S. 499 I. P. C.¹¹⁴

The accused may rely on the weakness of the case for the prosecution, or, for reasons of his own not disclosed decline to say anything in answer to Court's question. From this it cannot be presumed that his silence or apparent want of candour and explicitness is a sure indication of his guilt.¹¹⁵ But refusal to answer involves the grave risk of an adverse inference.¹¹⁶ Where a *prima facie* case of circumstances making out or tending to make out the charge is established and the accused withholds evidence in disproof or explanation available to him and not accessible to the prosecution, an inference unfavourable to the accused may legitimately be drawn; under S. 342 Cr. P.C it is open to the Court and the Jury to draw such inferences as they think just from the answers made by the accused to the necessary questions put by the Court.¹¹⁷ If an adverse inference is to be drawn against an accused from what he has said in his examination, the statement should be taken in its entirety; the accused in their statements put forward a story in defence as justifying the use of force by them in repelling the attack of the opposite party; *held*, that in order to draw an inference against them that they had used force the whole and not merely parts of their statements should be

109. *Sirsapa* (1879) 4 B. 15.

110. *Nga Tun Hlaing* (1923) 1 R. 759 (F. B.): 26 Cr. L. J. 108; A. I. R. 1924 R. 115; 83 I. C. 668; *Kandasami Thevan* (1923) 50 M. 462; 27 Cr. L. J. 1251; 98 I. C. 99.

111. *Basgit* (1926) 6 P. 305; 28 Cr. L. J. 850; A. I. R. 1928 P. 129; 104 I. C. 626 [following *Kiran Bala* (1925) 30 C. W. N. 373; 43 C. L. J. 79; 27 Cr. L. J. 409; A. I. R. 1926 C. 531; 93 I. C. 73].

112. *Bhondar* (1931) 35 C. W. N. 1212; 54 C. L. J. 499; 33 Cr. L. J. 11; A. I. R. 1931 C. 601; 134 I. C. 1053.

113. *Makhdam* (1924) 1 O. W. N. 657; 25 Cr. L. J. 1194; A. I. R. 1925 O. 227; 82 I. C. 58 (dissenting from *Barkat* (1897) 19 A. 200; *Bindeshri* (1906) 28 A. 331; 3 A. L. J. 98; 3 Cr. L. J. 225); *Champa Devi v. Pirbhu*

(1925) 24 A. L. J. 329, 331; 27 Cr. L. J. 253; A. I. R. 1926 A. 287; 92 I. C. 429.

114. *Bai Shanta v. Umrao* (1925) 50 B. 162 (F. B.): 27 Cr. L. J. 423; A. I. R. 1926 B. 141; 93 I. C. 151 [following *Satis Chandra* (1920) 48 C. 388 (S. B.): 24 C. W. N. 982; 32 C. L. J. 24; 22 Cr. L. J. 31; 59 I. C. 143]; *Tiruvengaga v. Tripurasundari* (1926) 49 M. 728 (F. B.); 27 Cr. L. J. 1026; A. I. R. 1926 M. 906; 96 I. C. 978.

115. *Meares* (1874) 22 W. R. 54, 57.

116. *Dwijendra* (1915) 19 C. W. N. 1043, 1054; 16 Cr. L. J. 724; 31 I. C. 164; *Sher Jang* (1930) 32 Cr. L. J. 684; A. I. R. 1931 L. 178; 131 I. C. 277.

117. *Ashraf Ali* (1917) 21 C. W. N. 1152; 19 Cr. L. J. 81; 43 I. C. 241, *per* Teunon, J.; *Contra per* Shamsul Huda, J.

taken into consideration.¹¹⁸ Before drawing an adverse inference against the accused on any point, it is, however, the duty of the Court to call his attention to it and ask for an explanation; where the Judge fails to do so the accused cannot be said to have failed to explain and no adverse inference can be drawn against him.¹¹⁹ The proof of a case against the accused depends for its support, not upon the absence or weakness of explanation on his part, but upon the positive affirmative evidence of his guilt that is given by the Crown.¹²⁰

5. Sub-s. (3) of S. 342.—

In cases of circumstantial evidence, the answers given by the accused may be considered as a part of the materials for the Court's decision as to his guilt, though technically not "evidence" under the Evidence Act; where the accused has no opportunity to prove his explanation, it must be accepted as it stands.¹²¹ The Court is at liberty to weigh his answers whether they tell for him or against him.¹²² When it is found that the prosecution witnesses deliberately suppressed the part played by the deceased, there is every justification to rely on the statement of the accused, especially when from the very first time he had told the same consistent story, and which had been subsequently corroborated by medical evidence.¹²³ There can be no comparison between the sworn testimony of witnesses and the bare statement of the prisoners.¹²⁴ A co-prisoner's statement has not the force of sworn evidence under S. 30 of the Evidence Act, as it is not on oath and cannot be tested by cross-examination.¹²⁵

If a person voluntarily elects to put on record a statement of his criminal activities, and thereafter neither repudiates that statement nor offers a reasonable explanation of it, he has no grievance whatever if the Court regards that statement as conclusive against him. In such circumstances, there is no burden placed on the Crown of establishing the truth of the admission of guilt *aliunde*.¹²⁶

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| 118. Wafadar Khan (1894) 21 C. 955. | 122. Virabhadra Goud (1863) 1 M. H. C. R. 199 : 2 Weir 253. |
| 119. Dwarkanath (1933) 37 C. W. N. 514 (P. C.) : 57 C. L. J. 177 : 35 Bom. L. R. 507 : 64 M. L. J. 466 : 1933 A. L. J. 645 : 34 Cr. L. J. 322 : A. I. R. 1933 P. C. 124 : 142 I. C. 335. <i>See also</i> Baliram (1932) 15 N. L. J. 116 : 34 Cr. L. J. 411 : 142 I. C. 785. | 123. Allah Ditta (1934) 36 Cr. L. J. 305 : A. I. R. 1934 L. 696 : 153 I. C. 209. |
| 120. Mamfru (1923) 51 C. 418 : 38 C. L. J. 397 : 25 Cr. L. J. 776 : A. I. R. 1924 C. 323 : 81 I. C. 264. | 124. Bhekoo Sing (1876) 7 W. R. 72. |
| 121. Abdul Gani (1925) 49 B. 878, 884, 889, 890 : 27 Cr. L. J. 114 : A. I. R. 1926 B. 71 : 91 I. C. 690. | 125. Nirmal Das (1900) 22 A. 445, 447 : 20 A. W. N. 169 ; Barendra (1923) 28 C. W. N. 170 (F.B.) : 38 C. L. J. 411, 559 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353 ; Har Dayal (1933) 8 Luck 39 : 34 Cr. L. J. 935 : A. I. R. 1933 O. 226 : 145 I. C. 359. |
| | 126. Suriya Kumar (1933) 35 Cr. L. J. 334 (S. B.) : A. I. R. 1934 C. 221 : 147 I. C. 32. |

6. Sub-s. (4) of S. 342.—

For the purpose of S. 342 no oath should be administered to the accused.¹²⁷ This Sub-section applies only to the conduct of trials and to the examination of the accused at the trial and does not apply to any proceeding outside the trial, such as an application to the High Court for transfer.¹²⁸ The prohibition is restricted only to such persons as happen to be accused in the same inquiry or trial, and not in a different case.¹²⁹

7. Procedure after asking the accused whether he means to adduce evidence (S. 289).—

It has already been seen that asking the accused 'whether he means to adduce evidence' is not the same thing as calling upon the accused to enter on his defence. The former is an inquiry merely, while the latter is a positive direction.

If the accused, or all the accused if there be more than one, informs the Court in reply that he does not mean to adduce evidence, then one of two things may happen the Court after allowing the prosecutor to sum up his case, (1) may, in a case tried with the aid of assessors, record a finding, or in a case tried by Jury, direct the Jury to return a verdict of not guilty, if the Court considers that there is no evidence against the accused (Sub-s. (2)) ; or (2) shall call on the accused to enter on his defence, if the Court considers that there is evidence against him (Sub-s. (4)). The prosecutor has the right to sum up only when the accused says that he does not wish to adduce evidence, whatever the Court's order afterwards may be. The 'accused' here signifies, where there are more than one accused, all the accused together.¹³⁰

If the accused or any of the accused says he means to adduce evidence, the Court may act in either of the two ways mentioned above according to his view of the evidence, but the prosecutor has no right to sum up his case at this stage (Sub-ss. (3) and (4)).

When, on being asked under this Section, the accused has stated through his attorney that he means to adduce evidence, but on further consideration does not do so, the Court is not at liberty to make a presumption adverse to the accused from the circumstance that he has not adduced evidence.¹³¹ If the accused has not his witnesses present in Court, the Judge should, if he sees grounds for proceeding, first (now, first examine him under S. 342 and then) call upon him for his defence, and then postpone the case.¹³² If he makes any statement in defence, it ought to be recorded ; if he does not voluntarily make any statement and declines to answer any question put by the Court, the fact should be noted ; and when there is nothing else to show the nature of the defence, a note of the address to the Court

127. Muhammad Yusuf (1931) 58 C. 1214 : 35 C. W. N. 490 : 32 Cr. L. J. 667 : A. I. R. 1931 C. 341 : 131 I. C. 142.

128. Sadasheo (1933) 29 N. L. R. 338 : 34 Cr. L. J. 1035 : A. I. R. 1933 N. 201 : 145 I. C. 445.

129. Durani (1898) 23 B. 213 ; Tirbeni (1898) 20 A.

426. See also Akhoy Kumar (1917) 45 C. 720 ; Sital (1918) 46 C. 700.

130. Sadanand (1894) 18 B. 364, 365.

131. Hurry Churn (1883) 10 C. 140 : 13 C. L. R. 358.

132. Jumiruddin (1875) 23 W. R. 58.

(if any) should be recorded ; the record is not complete unless it shows the nature of the defence set up.¹³³ The omission to make a note of the defence on the record is not a defect by which the accused could be prejudiced, when the trial is before a Jury.¹³⁴

8. Prosecutor may sum up his case.—

Properly speaking, the case for the prosecution consists of three parts, viz :—(1) the opening, in which the Counsel for the prosecution states briefly the nature of the offence charged and the facts he hopes to be able to prove ; (2) the production of documentary evidence and examination of witnesses for the prosecution ; and (3) the summing up. The third is the last stage of the case for the prosecution. After this, the defence has the right of reply. The right to begin carries with it the right to reply whenever the opponent adduces evidence in support of his case, otherwise not. (*See* S. 292). The words 'prosecutor' here includes a pleader whose assistance has been accepted by the Public Prosecutor or other officer conducting the prosecution.¹³⁵ *See* Notes under S. 270 in Chapter I, *ante*.

If the prosecution has not proved all the facts which it was proposed to prove but has proved only some of those facts, what the Court has to see is whether those facts which have been proved amount to the offence charged and whether the frame of the charge gave to the accused sufficient notice of the case to be met.¹³⁶ In a criminal case the quantity of evidence required does not vary with the enormity of the crime. Every person accused of any offence is entitled to claim that the charge against him shall be clearly established by admissible evidence. If the Judge is not so convinced then it is his duty not to convict. But if he is fully satisfied and if he has reached that satisfaction by the use of admissible methods of proof, then it is immaterial whether those methods be a confession, a circumstance or the testimony of a witness.¹³⁷

9. 'No evidence'—Meaning of,—

The words "no evidence" in the 2nd and 3rd Clauses of S. 289 must not be read as meaning "no satisfactory, trustworthy, or conclusive evidence". If there is evidence, the trial must go on to its close, when on trials by Jury the Jury and in other trials the Judge, after considering the opinions of the assessors, have to find on the facts. It is only in the absence of any evidence as to the commission of the offence by the accused or on such evidence that the Jury can conjecture only and not judge that the Court can record an acquittal without allowing the trial to go on, or obtaining the opinion of the assessors, or that the Court can direct the Jury, without going into the defence, to return a verdict of not guilty.¹³⁸ Where witnesses for the prosecution had not appeared as there was some blunder as to the date in summoning them, and the Public Prosecutor asked for adjournment, but the Judge refused the application and called upon the Public Prosecutor to open the case and the accused to

133. Gopal Hajjam (1871) 15 W. R. 16 ; Viran (1886) 9 M. 224, 244 ; 2 Weir 125.

134. Gopal Hajjam (1871) 15 W. R. 16.

135. *In re Narayan* (1874) 11 Bom. H. C. R. 102.

136. Ghyasuddin (1932) 11 P. 523 ; 33 Cr. L. J. 864 ; A. I. R. 1932 P. 215 ; 139 I. C. 616.

137. Salu (1933) 34 Cr. L. J. 808 ; A. I. R. 1933 S. 165 ; 144 I. C. 664.

138. Vajiram (1892) 16 B. 414.

plead ; and the Public Prosecutor opened the case under protest and then the Judge directed the Jury to return a verdict of not guilty as there was no evidence ; *held*, that, in the circumstances of the case it was wrong for the Judge to tell the Jury that there was no evidence and they should return a verdict of not guilty.¹³⁹ Sub-s. (3) means that if at a certain stage of a Sessions trial the Court is satisfied that there is not on the record any evidence which, even if it were perfectly true, would amount to legal proof of the offence charged then the Court has power, without consulting the assessors, to record a finding of not guilty. But when a Court so acts because it considers the evidence for the prosecution unsatisfactory, untrustworthy or inconclusive, it acts without jurisdiction, and its order discharging the accused is illegal. Even if not illegal for want of jurisdiction, such action is a serious irregularity, which may or perhaps must have caused a failure of justice within the meaning of S. 537 of the Code, as the prosecution is debarred from summing up the case and the Sessions Judge himself is precluded from the advantage of taking the opinion of the assessors upon the evidence.¹⁴⁰ 'No evidence worth the name' is not a case of 'no evidence'; direction to acquit because there is only one witness implicating the accused and that witness himself was contradicted, is an error of law.¹⁴¹ When the only evidence against the accused is his own statement which did not amount to a confession, the Jury should be directed to find a verdict of 'not guilty' as there is no evidence against him at all.¹⁴² The confession of a co-accused, though evidence against the other accused under S. 30 of the Evidence Act, cannot, if not corroborated by other evidence, sustain a conviction ; hence the Court should direct the Jury to acquit him.¹⁴³ In a case tried by a Jury, when there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all, as a verdict of guilty cannot, under such circumstances, be sustained.¹⁴⁴ The Sessions Judge has no right to pronounce his own judgment on the credibility of the evidence, and to withdraw the consideration of the due weight to be given to the evidence from the Jury ; in this case the prisoner was charged with murder and he made a confession that he did strike the deceased with a stick and the Sessions Judge discredited the confession and all the evidence except the medical evidence and discharged the prisoner, not considering it necessary that the case should go before the Jury.¹⁴⁵ When more persons than one are tried together and there is no evidence as against one, he must be immediately acquitted.¹⁴⁶ See further Notes under heading 'No evidence' in Chap. I. of Part IV, *post*.

Where there is no evidence, then in a case tried with assessors, the Judge need not take the opinion of the assessors but may himself record a finding of not guilty ; but in a case

139. *Sader Saik* (1925) 30 C. W. N. 190 : 27 Cr. L.J. 125 : A. I. R. 1926 C. 584 : 91 I. C. 701.

140. *Munna Lal* (1888) 10 A. 414 : 8 A. W. N. 129 ; *Ramcharitar* (1927) 7 P. 15 : 28 Cr. L. J. 692 : A. I. R. 1927 P. 370 : 103 I. C. 548 ; *Nawal Kishore* (1929) 1929 P. 244 : 30 Cr. L. J. 519 : A. I. R. 1929 P. 121 : 115 I. C. 692.

141. *Rahamali* (1925) 26 Cr. L. J. 1151 : A. I. R. 1925 C. 1055 : 83 I. C. 463.

142. *Greedhary* (1867) 7. W. R. 39.

143. *Ashootosh* (1878) 4 C. 483 (F.B.) : 3 C. L. R. 270 ; *Gangapa* (1913) 38 B. 156 : 14 Cr. L. J. 625 : 21 I. C. 673 ; *Giddigadu* (1939) 33 M. 46 : 9 Cr. L. J. 404 : 1 I. C. 867.

144. *Rutton* (1871) 16 W. R. 19.

145. *Hurroo* (1871) 16 W. R. 20 ; *High Court Proceedings*, 28th January 1889, No. 102 : 2 *Weir* 391.

146. *Hari Charan* (1925) 27 Cr. L. J. 398 : A. I. R. 1926 C. 728 : 93 I. C. 46.

tried by a Jury, the Judge himself cannot pass that order but must direct the Jury to return a verdict to that effect. Proceeding with the trial when there is no evidence is a contravention of S. 289 (2).¹⁴⁷ The Court of Session cannot withdraw a case from the Jury, that is to say, quash it itself, on any ground whatever.¹⁴⁸ It can, however, withdraw a charge added by it to the charge on which the commitment was made under S. 227, without putting the case on the additional charge to the assessors at all; S. 289 applies only where there is no evidence and would not cover a case when the Court considers that the charge was in itself improper.¹⁴⁹

10. 'Call on the accused to enter on his defence'.—Meaning of,

This is not a mere formality, but is an essential part of a criminal trial, and an omission to do so occasions a failure of justice and is not cured by S. 537, even where he could not have said much in his defence.¹⁵⁰ But it has been *held* on the contrary that where an accused person was asked after his examination whether he wanted to examine any witnesses and stated he did not and the case was then summed up by the prosecution and the defence pleaders, and it was contended that the trial was vitiated by non-compliance with Cl. (4), in as much as the Court did not call upon the accused to enter on his defence; the said Clause only meant that if the accused called no witnesses, he or his pleader is to make his final address to the Court and there was no non-compliance with the provisions of law; *held* further, that even otherwise, omission to call upon the accused to enter on his defence is a mere irregularity cured by S. 537 Cr. P.C.¹⁵¹

11. Procedure, after the Court calls upon the accused to enter on his defence (S. 290).

The accused or his pleader may then open his case. 'Opening a case' means stating the facts or law on which he intends to rely and making necessary comments on the evidence for the prosecution. Every accused person may of right be defended by a pleader (S. 340). His duty is to act as an advocate, and not to any extent as a Judge. He is to put himself in place of the accused and is not, therefore, under any obligation which the accused would not be under; thus, he is not obliged to divulge facts with which he may be acquainted and which are unfavourable to the prisoner.¹⁵² The duty of the defence Counsel is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged, though the accused might have confessed his guilt to him.¹⁵³ Counsel for the prisoner should not

147. *Ibid*

148. Jogeshwar (1901) 5 C.W.N. 411, 413; Nawal Kishore (1929) 1929 P. 244; 30 Cr. L. J. 519; A. I. R. 1929 P. 121; 115 I. C. 692.

149. Dwarka Lal v. Mahadeo (1890) 12 A. 551; 10 A. W. N. 178.

150. Imam Ali (1895) 23 C. 252.

151. *In re Thappa* (1935) 37 Cr. L. J. 45; 159 I. C. 30; Premgir (1917) 16 A. L. J. 41; 19 Cr. L. J. 209; 43 I. C. 785.

152. Harris' Principles of Criminal Law, P. 419.

153. Barendra (1923) 28 C.W.N. 170 (F.B.); 38 C. L. J. 411; 25 Cr. L. J. 817; A. I. R. 1924 C 257; 81 I. C. 353 *per* Mookerjee J. The case went upon appeal to Privy Council; *See* Barendra (1924) 52 I. A. 40; 52 C. 197 P. C.; 29 C. W. N. 181; 41 C. L. J. 240; 27 Bom. L. R. 148; 48 M. L. J. 543; 23 A. L. J. 314; 26 Cr. L. J. 431; A. I. R. 1925 P. C. 1; 85 I. C. 47.

state as alleged existing facts, matters which he had been told in his instructions, on the authority of the prisoner, but which he does not propose to prove by evidence or suggest in cross-examination of prosecution witnesses.¹⁵⁴ A prisoner, who is defended by Counsel, ought not to be allowed to make a statement in addition to the defence of Counsel, unless under very particular circumstances, and the general rule ought to be that a prisoner defended by Counsel should be entirely in the hands of his Counsel.¹⁵⁵ The prisoner can not have Counsel to examine and cross-examine the witnesses and reserve to himself the right of addressing the Jury.¹⁵⁶ An accused person cannot be barred from setting up inconsistent pleas. He may plead *alibi* and at the same time plead the right of self-defence.¹⁵⁷ But such defences are weak, unconvincing and embarrassing.¹⁵⁸ Nature of the defence is to be ascertained not only from the statements of the accused persons themselves but also from the trend of the cross-examination of the prosecution witnesses and from the arguments of the accused's pleader at the close of the trial.¹⁵⁹ Accused, having a defence, should give evidence in support of it and not trust to mere discrepancies in the prosecution case.¹⁶⁰ Falsehoods in a defence case do not tend to indicate the guilt of the accused. The entire omission of an available, true and complete defence and the substitution for it of an unsustainable falsehood are so universally common that one cannot infer from such a defence that the guilt is likely.¹⁶¹ The conduct of a case by Counsel is not a negligible factor even in a criminal suit, though it may not conclude the accused, and in approaching the question whether the Judge rightly decided as a matter of law that there was no evidence of any of the exceptions in S. 300 I. P. C, it is relevant to consider how the accused's case was placed before the Court.¹⁶² The accused is merely on the defensive and owes no duty to any one but himself. He is at liberty, as to the whole or any part of the case against him, to rely on the witnesses for the prosecution, or to call witnesses, or to meet the charge in any way he chooses, and no inference unfavourable to him can properly be drawn, because he

154. Nogendra (1915) 19 C. W. N. 923 : 21 C. L. J. 396 : 16 Cr. L. J. 576 : 30 I. C. 128 ; Barendra (1923) 28 C. W. N. 170 (F. B.) : 38 C. L. J. 411 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353 ; Bhaji Shankar v. Wadia (1899) 2 Bom. L. R. 3 (F. B.).

155. Rider, (1838) 8 C. & P. 539.

156. White, (1811) 2 Camp. 98.

157. Santa Singh (1927) 29 Cr. L. J. 117 : A. I. R. 1927 L. 710 : 106 I. C. 709 ; Ajgar Shaikh (1928) 32 C. W. N. 839 : 48 C. L. J. 138 : 30 Cr. L. J. 799 : A. I. R. 1928 C. 700 : 117 I. C. 596 ; Janki (1933) 35 Cr. L. J. 92 : A. I. R. 1933 P. 568 : 146 I. C. 533 ; Yusuf Husain (1918) 40 A. 284, 288 : 19 Cr. L. J. 371 : 44 I. C. 675 ; Kishen Lal (1924) 22 A. L. J. 501 : 26 Cr. L. J. 501 : A. I. R. 1924 A. 645 : 85 I. C. 245 ; Faudi (1919) 5 P. L. J. 64 : 21 Cr. L. J. 799 : 58 I. C. 527.

158. See Nogendra (1923) 27 C. W. N. 820 : 38 C. L. J. 203 : 25 Cr. L. J. 190 : A. I. R. 1923 C. 717 : 76 I. C. 430 ; Afruddi (1919) 23 C. W. N. 833 : 29 C. L. J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485 ; Yusuf Husain (1918) 40 A. 284 : 19 Cr. L. J. 371 : 44 I. C. 675 ; Adam Ali (1926) 31 C. W. N. 314, 317 : 45 C. L. J. 131 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718.

159. Kuti (1930) 51 C. L. J. 339 : 31 Cr. L. J. 1203 : A. I. R. 1930 C. 442 : 127 I. C. 263.

160. Ram Pershad (1925) 26 Cr. L. J. 1589 : A. I. R. 1926 P. 5 : 90 I. C. 661.

161. Domarsing (1922) 23 Cr. L. J. 345 : A. I. R. 1922 N. 87 : 66 I. C. 1001.

162. Upendra (1914) 19 C. W. N. 653 (S. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113, per Jenkins, C. J.

takes one course rather than another. It is unreasonable to reproach the accused for not calling those witnesses whom the prosecution thought to be untrustworthy.¹⁶³ An accused person is entitled to put forward any defence open to him, technical or otherwise, and to have the Court's judgment on it. It is no affair of the defence to supplement or explain deficiencies or suspicious circumstances appearing on the face of the prosecution evidence. It is open to it to say that the prosecution has not proved its case, and to refer to such deficiencies in proof of the submission or to other circumstances appearing on the face of the prosecution evidence which show that it is so open to suspicion that it would be unsafe to accept it. If, however, the defence puts forward a case of fraud or if the evidence for the prosecution is not ambiguous, the defence should give notice of the point they intend to take so that the prosecution may have an opportunity of explanation. If any charge of fraudulent practice was going to be based on a circumstance which, standing by itself, was not necessarily suspicious, the defence should have cross-examined the witnesses on the point.¹⁶⁴ The prosecution must depend for its support upon the positive affirmative evidence of guilt given by the Crown, and not upon the absence or want of explanation on the part of the prisoner. For a conviction on circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused.¹⁶⁵ Grave suspicion is not a justification for the conviction of an accused person.¹⁶⁶ But where a set of facts is proved from which having regard to human experience, only one reasonable inference can be drawn, the accused must, if he wishes to escape the consequence of that inference, offer an alternative inference which can compete in probability with that suggested to an ordinary mind by the evidence.¹⁶⁷ There is no such recognised principle that if the prosecution witnesses have been discredited in essential particulars, it is not open to the Court nevertheless to accept a part of their story for convicting the accused.¹⁶⁸ But it is not the duty of a Judge to find any and every reason possible and accept any and

163. *Dhunno Kazi* (1881) 8 C. 121.

164. *Romesh* (1913) 41 C. 350 : 18 C. W. N. 498 : 15 Cr. L. J. 385 : 23 I. C. 985. *See also* *Usuf Khan* (1923) 30 Cr. L. J. 311 : A. I. R. 1929 N. 215 : 114 I. C. 457.

165. *Shevanti* (1928) 29 Cr. L. J. 561 : A. I. R. 1928 N. 257 : 109 I. C. 497 ; *Natha Singh* (1924) 6 L. L. J. 579 : 26 Cr. L. J. 949 : A. I. R. 1925 L. 282 : 87 I. C. 101 ; *Mamfru* (1923) 51 C. 418 : 38 C. L. J. 397 : 25 Cr. L. J. 776 : A. I. R. 1924 C. 323 : 81 I. C. 264 ; *Ramudu* (1922) 44 M. L. J. 243 : 24 Cr. L. J. 426 : A. I. R. 1923 M. 365 : 72 I. C. 538 ; *Jahura Bibi* (1930) 35 C. W. N. 169 : 52 C. L. J. 417 : 32 Cr. L. J. 418 : A. I. R. 1931 C. 11 : 129 I. C. 67 ; *Hawaladar* (1932) 9 O. W. N. 170 : 33 Cr. L. J. 379 : A. I. R. 1932 O. 324 : 137 I. C. 63 ; *Gowardhan* (1931) 34 Cr. L. J. 714 : A. I. R. 1933 L. 308 : 144 I. C. 301 ; *Hem Chandra* (1934) 38 C. W. N. 582 :

35 Cr. L. J. 712 : A. I. R. 1934 C. 407 : 148 I. C. 543 ; *Manar Ali* (1933) 60 C. 1339 : 37 C. W. N. 1066 : 58 C. L. J. 66 : 35 Cr. L. J. 567 : A. I. R. 1934 C. 124 : 147 I. C. 1203.

166. *Basudeb* (1928) 30 Cr. L. J. 835 : A. I. R. 1929 P. 112 : 117 I. C. 879 ; *Lila Ram* (1927) 9 L. L. J. 514 : 29 Cr. L. J. 532 : A. I. R. 1927 L. 852 : 109 I. C. 356 ; *Miran Bakhsh* (1931) 32 Cr. L. J. 1032 : A. I. R. 1931 L. 529 : 133 I. C. 446 ; *Surat Singh* (1922) 26 Cr. L. J. 28 : A. I. R. 1923 L. 42 : 83 I. C. 508 ; *Hawaladar* (1932) 9 O. W. N. 170 : 33 Cr. L. J. 379 : A. I. R. 1932 O. 324 : 137 I. C. 63 ; *Pittu* (1932) 9 O. W. N. 243 : 33 Cr. L. J. 514 : 137 I. C. 290 ; *Adhinn* (1932) 9 O. W. N. 451.

167. *Leda Bhagat* (1929) 10 P. 590 : 33 Cr. L. J. 111 : A. I. R. 1931 P. 384 : 135 I. C. 81.

168. *Ibid*

every argument to whittle away the significance and the defects of the prosecution.¹⁶⁹ There is no fundamental rule of law which prevents a Judge, if he finds that the prosecution story as told by the prosecution witnesses is untrue, from doing the best he can, in view of all the evidence given in the case, to arrive at some theory as to what has actually happened, if he can fairly do so upon the evidence. But in a case where the story of the occurrence in its fundamental aspects has been found by the Judge to be untrue, it will rarely, if even, be possible to accept the evidence of the prosecution witnesses who have obviously conspired together to tell that false story.¹⁷⁰

12. Defence of Alibi.—

Whenever a defence of *alibi* is set up and that defence utterly breaks down, it is a strong inference that if the prisoner was not in fact where he says he was, then in all probability he was where the prosecution says he was. At any rate the line of defence adopted and his failure to substantiate it is an element which it is right to take into consideration in deciding whether or not the accused is guilty.¹⁷¹

13. Pleading exceptions.—

Accused is not bound to plead an *Exception*.¹⁷² The accused has only to plead not guilty, and it is the Court's duty to determine on the entire evidence, whether any and what offence is established. If an Exception e. g., right of private defence, appears on the prosecution or defence evidence, the trial Court must accept the plea though raised only during the arguments,¹⁷³ or take it *suo motu* if not raised at all.¹⁷⁴ S. 105 of the Evidence Act does not mean that the accused is to lead evidence : if the exception appears from the prosecution or defence evidence, the presumption is removed and the Court may determine whether such evidence proves to its satisfaction that the case is within the Exception.¹⁷⁵ The defence is entitled to be heard and developed during the prosecution case,¹⁷⁶ so the onus may be discharged on the prosecution evidence.¹⁷⁷

169. Patey Singh (1931) 1931 A. L. J. 1000 : 32 Cr. L. J. 1052 : A. I. R. 1931 A. 609 : 133 I. C. 593 ; Chhutkan (1934) 11 O. W. N. 1540 : 36 Cr. L. J. 246 : A. I. R. 1935 O. 33 : 153 I. C. 52.

170. Habibur Rahman (1931) 1931 P. 216 : 32 Cr. L. J. 736 : A. I. R. 1931 P. 339 : 131 I. C. 536.

171. Sarat Chandra (1934) 35 Cr. L. J. 1335 (S.B.) : A. I. R. 1934 C. 719 : 151 I. C. 473.

172. Umed Singh (1923) 46 A. 64 : 25 Cr. L. J. 327 : A. I. R. 1924 A. 299 : 77 I. C. 183 ; Jeremiah v. Vas (1911) 36 M. 457 : 12 Cr. L. J. 585 : 12 I. C. 961 ; Adam Ali (1926) 31 C. W. N. 314 : 45 C. L. J. 131 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718.

173. Pasput v. Ram (1897) 1 C. W. N. 545, 547.

174. Kishen Lal (1924) 22 A. L. J. 501 : 26 Cr. L. J. 501 : A. I. R. 1924 A. 645 : 85 I. C. 245 ;

Upendra (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; Jhakri (1912) 16 C. L. J. 440 : 13 Cr. L. J. 905 : 17 I. C. 1001 ; In the matter of Kali Charan (1882) 11 C. L. R. 232 ; Musammat Anandi (1923) 45 A. 329 : 24 Cr. L. J. 225 : A. I. R. 1923 A. 327 : 71 I. C. 639.

175. Musst Anandi (1923) 45 A. 329 : 24 Cr. L. J. 225 : A. I. R. 1923 A. 327 : 71 I. C. 689.

176. Rajbansi (1920) 42 A. 645, 684 : 22 Cr. L. J. 228 : 60 I. C. 420.

177. In the matter of Kali Charan (1882) 11 C. L. R. 232, 233 ; Pasput v. Ram (1897) 1 C. W. N. 545, 547 ; Yusuf Husain (1918) 40 A. 281, 288 : 19 Cr. L. J. 371 : 44 I. C. 675 ; Rajbansi (1920) 42 A. 646 : 22 Cr. L. J. 228 : 60 I. C. 420 ; Wajid Husain (1910) 32 A. 451, 453, 455 : 11 Cr. L. J. 374 : 6 I. C. 589.

Even where a plea in exception will be inconsistent with the defence of denial, alibi, accident or the like, the Court may act on it where the exception is established on the prosecution or defence evidence.¹⁷⁸

But if the accused puts forward a substantial plea under S. 80 I. P. C., he must prove it and give a detailed account of the occurrence.¹⁷⁹ On a prosecution under S. 341 I. P. C. the plea under S. 339 I. P. C. should be clearly raised.¹⁸⁰ It is for the accused to set forth and prove an exception under S. 76 I. P. C.¹⁸¹ But the real point in all these cases is not whether the plea was taken, but whether there was evidence of it.¹⁸²

The accused cannot be asked to account for his movements at or about the time an offence was committed, unless there was *prima facie* legal evidence to convict him of the offence.¹⁸³ A Sessions Judge can, of his own motion, summon a witness for the defence though he may not have been included in the list given by the accused on commitment, and any witness so summoned is bound to attend;¹⁸⁴ but S. 540 of the Code does not empower the Court to reverse the order of examination of the witnesses so as to entitle it to call a defence witness before the close of the case for the prosecution.¹⁸⁵ But the conviction will not be quashed therefor on appeal unless the accused was prejudiced.¹⁸⁶ If the Sessions Judge recalls one witness for the prosecution and the prisoner had no opportunity of calling evidence with reference to the evidence of that witness, the High Court would quash the conviction and order a new trial.¹⁸⁷ It is a grave irregularity to allow a witness to be examined on behalf of the prosecution after the prisoner had made his defence, the witness not being a witness to contradict a new case set up by the prisoner, which, under ordinary circumstances, would induce the High Court to set aside the trial; but where the prisoner had notice of the point on which this evidence was taken and had already made his defence on that, the irregularity was not sufficient to cause a failure of justice.¹⁸⁸ An accused should be given every opportunity to prepare his defence and not to be hampered.¹⁸⁹

As to the examination of a witness not previously named, *see* Notes under S. 291, *post*.

A witness called by one of the accused may be cross-examined by another accused when the case of the second accused is adverse to that of the first. The Evidence Act gives a right

178. Afiruddi (1919) 23 C. W. N. 833 : 29 C. L. J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485 ; Nagendra (1923) 27 C. W. N. 820 : 38 C. L. J. 203 : 25 Cr. L. J. 190 : A. I. R. 1923 C. 717 : 76 I. C. 430.

179. Dwijendra (1915) 19 C. W. N. 1043, 1047, 1053 : 16 Cr. L. J. 724 : 31 I. C. 164.

180. Kalidas v. Deodhari (1925) 30 C. W. N. 192 : 41 C. L. J. 633 : A. I. R. 1925 C. 1214.

181. Wajid Husain (1910) 32 A. 451, 457 : 11 Cr. L. J. 374 : 6 I. C. 589.

182. Yusuf Husain (1918) 40 A. 284, 286, 287 : 19 Cr. L. J. 371 : 44 I. C. 675.

183. Bepin (1884) 10 C. 970.

184. In re Rajah of Kantit (1886) 8 A. 668 : 6 A. W. N. 260.

185. Hargobind (1892) 14 A. 242 : 12 A. W. N. 83 ; Hayfield (1892) 14 A. 212 : 12 A. W. N. 63 ; Assanoollah (1870) 13 W. R. 15.

186. Taribullah (1879) 4 C. L. R. 338.

187. Assanoollah (1870) 13 W. R. 15.

188. Sham Kishore (1870) 13 W. R. 36.

189. Ramgopal (1931) 58 C. 1132 : 35 C. W. N. 547 : 33 Cr. L. J. 15 : A. I. R. 1932 C. 285 ; 134 I. C. 891.

to cross-examine witnesses called by the adverse party.¹⁹⁰ Statement made by a defence witness against a person other than the one who had called him as a witness, cannot be considered as if it were evidence led on behalf of the complainant.¹⁹¹

14. Summing up the Defence Case.—

After the witnesses for the defence are examined cross-examined and re-examined, the accused or his pleader may sum up his case. Compare S. 289 and *see* Note under Sub-heading "Prosecution may sum up his case". This is the last stage of the defence, and after this summing up, the prosecutor has got the right to reply. *see* S. 292, *post*. When there are more accused than one, their Counsel should all be heard after the close of the whole of the defence evidence; if not, the procedure is irregular but does not vitiate the trial in the absence of any prejudice to the accused.¹⁹²

As to comments on the case for the prosecution, *see* Notes under the preceding heading. Where a fundamental portion of the prosecution case can not be believed, it is impossible to believe the rest and base a conviction on it,¹⁹³ without corroboration.¹⁹⁴ Where the prosecution case is false materially and substantially and where the defence version is largely found to be true, it is illegal to convict the accused on the residue of the prosecution case.¹⁹⁵ Prosecution evidence must be judged on its own merits, and hence when the prosecution evidence is quite unreliable the accused cannot be convicted even though the version of the accused is also unconvincing.¹⁹⁶ Where the story of the prosecution and the evidence in support of it are so garbled and distorted, and where the true facts of the case are so overlain with a mass of lies that it is practically impossible to disentangle them from the falsehoods in which they lie embedded, no conviction can be legally based upon such tainted evidence upon which no credence can be placed, and in respect of which the trial Judge or the appellate Court cannot assert what portion of it is true and induces belief in the existence of certain facts, and what portions of it are false and unworthy of belief.¹⁹⁷ If it is proved that a witness for the prosecution has given false evidence it is unsafe to rely upon him at all; this rule should be strictly applied.¹⁹⁸ Mere verbal contradictions and discrepancies are not sufficient to discredit the clear and consistent testimony of eye-witnesses, which is also supported by the circumstantial evidence; the measure of stupidity of these witnesses,

190. *Ram Chand v. Hanif* (1893) 21 C. 401.

191. *Chatar Bhuj* (1930) 12 L. 385 : 32 Cr. L. J. 672 : A. I. R. 1931 L. 57 : 131 I. C. 238.

192. *Mohinder* (1931) 33 Cr. L. J. 97 : A. I. R. 1932 L. 103 : 135 I. C. 209.

193. *Sadhu Dome* (1932) 13 P. L. T. 765 : 34 Cr. L. J. 227 : 141 I. C. 786.

194. *Uija* (1933) 10 O. W. N. 976 : 35 Cr. L. J. 299 : A. I. R. 1933 O. 467 : 147 I. C. 111.

195. *Ghurpat* (1920) 22 Cr. L. J. 479 : 61 I. C. 1007 (P). *See also* *Jaspath Singh* (1886) 14 C. 164,

196. *Piran Ditta* (1933) 35 Cr. L. J. 69 : A. I. R. 1933 L. 808 : 146 I. C. 321 ; *Ratan* (1933) 8 Luck. 570 : 35 Cr. L. J. 45 : A. I. R. 1933 O. 333 : 146 I. C. 381.

197. *Har Dayal* (1933) 8 Luck 397 : 34 Cr. L. J. 935 : A. I. R. 1933 O. 226 : 135 I. C. 359 ; *Asmatullah* (1933) 56 A. 188 : 35 Cr. L. J. 236 : A. I. R. 1933 A. 896 : 146 I. C. 914.

198. *Man Singh* (1933) 1933 A. L. J. 581 : 34 Cr. L. J. 765 : A. I. R. 1933 A. 401 : 144 I. C. 383 ; *Puran Singh* (1934) 15 L. 765 : 35 Cr. L. J. 1005 : A. I. R. 1934 L. 743 : 149 I. C. 476.

especially when they are villagers, is not the measure of their veracity and truthfulness.¹⁹⁹ In every criminal case the onus lies on the prosecution to prove the guilt of the accused; the onus does not lie on the accused person to establish his innocence.²⁰⁰

Where one set of facts is stated in the charge as constituting a particular offence and the accused has sought to meet that case, and he is subsequently convicted of the same offence but on an absolutely different set of facts, it is certainly a legal error; and a conviction so recorded is liable to be set aside, because the accused can be said to have been prejudiced in his defence.²⁰¹ In cases of rioting it often happens that the Court may consider that the story told by the prosecutor is false in some of its details, but is nevertheless sufficient to prove the guilt of the accused; but it is not permissible to base a conviction upon a hypothetical state of facts, which is quite unsupported by evidence, which was never put forward by the prosecution and was never suggested to the accused as being the case they had to meet.²⁰² Technical points may very well be used on behalf of accused persons but they should not be used to harass accused persons.²⁰³ It is an elementary principle of criminal law that when the Section creating an offence mentions in the definition of offence a particular state of mind on the part of the offender as being an ingredient in the offences, the burden of proof is placed on the prosecution to establish that such a state of mind was present in the accused at the time of committing the act charged. The difficulty of proving the ingredients of the offence is no good reason for exempting the prosecution from the duty of proving them before a conviction is recorded.²⁰⁴ A person cannot be convicted merely because his own story is false.²⁰⁵ In a murder case, it is for the prosecution witnesses to prove affirmatively and beyond all reasonable doubt that the accused was responsible for the murder, and not for the accused to prove how the deceased met with his death.²⁰⁶ When, of two accused persons, one is charged with murder and the other with being accessory after the fact, the question whether the accused had been murdered by the first accused is in issue between each prisoner and the Crown; and the second accused is entitled to insist on proof and challenge the evidence of it even if the first accused pleads guilty. Consequently, Counsel for the second accused has a right in himself to address the Court on the above question.^{206a}

199. Ratan (1933) 8 Luck. 570 : 35 Cr. L. J. 45 : A. I. R. 1933 O. 333 : 146 I. C. 381 ; Salu (1933) 34 Cr. L. J. 808 : A. I. R. 1933 S. 166 : 144 I. C. 664.

200. Nishikanta (1932) 60 C. 656 : 37 C. W. N. 368 : 34 Cr. L. J. 1059 : A. I. R. 1933 C. 532 : 145 I. C. 660 ; Salu (1933) 34 Cr. L. J. 808 : A. I. R. 1933 S. 166 : 144 I. C. 664 ; Har Dayal (1933) 8 Luck 397 : 34 Cr. L. J. 935 : A. I. R. 1933 O. 226 : 135 I. C. 359 ; Bolai V. Bishnu (1934) 38 C. W. N. 474 : 35 Cr. L. J. 715 : A. I. R. 1934 C. 425 : 148 I. C. 559 ; Bhikchand (1933) 28 S. L. R. 84 : 36 Cr. L. J. 818 : A. I. R. 1934 S. 22 : 155 I. C. 439.

201. Parsram (1932) 35 Cr. L. J. 582 : A. I. R. 1933 S. 225 : 148 I. C. 66.

202. Banga Hadua (1939) 11 C. L. J. 270 : 11 Cr. L. J. 245 : 51 C. 771.

203. Kesavarao V. Simhadri (1933) 1933 M. W. N. 1426.

204. Shahzad Khan (1933) 34 Cr. L. J. 912 : A. I. R. 1933 P. 513 : 144 I. C. 857.

205. Tarapada (1933) 37 C. W. N. 426 : 34 Cr. L. J. 1073 : A. I. R. 1933 C. 603 : 145 I. C. 814.

206. Sayeed Khan (1934) 11 O. W. N. 1219 : 36 Cr. L. J. 181 : A. I. R. 1935 O. 7 : 152 I. C. 432.

206 a. Mahadeo (1936) 40 C. W. N. 1164 (P. C.).

15. Summoning of defence witnesses (S. 291).

The summoning of defence witnesses is ordinarily left to the Magistrate who committed the accused, or to the Clerk of the Crown when the case is committed to the High Court. *See* S. 216. Under S. 211, the accused is required, after the charge has been read and explained to him, at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on the trial, and the Magistrate, in his discretion, may allow him to give in any further list of witnesses at a subsequent time. Where the accused is committed to the High Court, he may, at any time before his trial, give to the Clerk of the Crown a further list of witnesses whom he wishes to be summoned to give evidence on such trial. Under S. 231, when a charge is altered or added to by the Court after the commencement of the trial, the accused shall be allowed to recall or resubmit and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witnesses whom the Court may think to be material. Therefore, where the matter is not covered by S. 231, the accused has no right to have any witness summoned, other than the witnesses named in the list delivered to the Committing Magistrate or to the Clerk of the Crown under the provisions of Ss. 211 and 216. If a witness not named in the lists as aforesaid be present in Court, and the accused wishes to examine him, he shall be allowed to do so by the Court of Session.²⁰⁷ But if he be not so present the Court may, on the application of the accused, summon him; for, under S. 291, though the summoning of witnesses by accused through the medium of the Sessions Judge, is not a matter of right, yet the Judge has an inherent power, if he thinks proper to exercise it, to sanction the summoning of other witnesses than those named in the list delivered to the Committing Magistrate.²⁰⁸ The Sessions Judge's discretion in allowing a person to be thus summoned should not ordinarily be interfered with in revision, on the application of that person, for it is the duty and it should be a cheerful duty of everyone to attend a Court of Justice when summoned to give evidence as a witness, particularly on behalf of an accused.²⁰⁹ The Sessions Judge may, in his discretion, cause any witness to be summoned for the accused on an application made during the trial, and he is bound to procure the attendance of such witnesses, if he considers that their evidence may be material.

It may be dangerous in some districts for the accused to run the risk of having his witnesses tampered with. It may thus be wise in some cases for the accused to decline to give a list to the Magistrate, and to reserve his evidence for the Court of Session. In order to entitle him to have his witnesses summoned, he must satisfy the Judge of the probability that such witnesses would be material.²¹⁰ Where the Sessions Judge did not allow a Police Inspector present in Court to be examined for the defence and the accused was prejudiced

207. *Bikas* (1189) 16 C. 610, 618; *Shakir* (1897) 19 A. 502.

208. *In re Rajah of Kantit* (1886) 8 A. 668 : 6 A.W.N. 260; *Misri Lal* (1933) 1934 A. L. J. 67 : 35 Cr. L. J. 591 : A. I. R. 1934 A. 372 : 147 I. C.

1197; *Ramsewak* (1927) A. I. R. 1933 P. 559.

209. *In re Rajah of Kantit* (1886) 8 A. 668, 670 : 6 A. W. N. 260.

210. *Shakir* (1897) 19 A. 502.

thereby, the High Court quashed the conviction and ordered a new trial.²¹¹ The Section allows the accused to examine a witness not previously named by him ; and even though it does not in express terms refer to a witness who has been discharged, the Court may, if it thinks that the interests of justice would be served, allow the accused an opportunity for his production.²¹² It is for the accused and not the Judge to determine the proper amount of evidence he should adduce ; the latter cannot refuse to summon witnesses to prove a fact because he thinks there is already ample evidence of it.²¹³

The Judge is bound to take steps to procure the attendance of all witnesses named in the list, and to adjourn the case, if necessary, for the purpose.²¹⁴ Where during the trial before the Sessions Court, the prisoner applied for an adjournment on the ground that two witnesses for the defence were absent, one being too ill to attend, the other not having been served with the summons, and the Sessions Judge refused the application on the ground that the evidence of these witnesses would in no case carry much weight and that they would speak to the same facts as other "witnesses of just as much respectability whom I have discredited", and consequently that the application was made "to delay the case and defeat justice" ; it was held on appeal that they were material witnesses on whose evidence, if believed, the whole case against the accused must fail, and that it was not open to the Sessions Judge to decide on the credit to be attached to their evidence before he had had an opportunity of hearing it. The Sessions Judge was accordingly directed under S. 428 to take that evidence and to certify the same to the Appellate Court.²¹⁵ Where the Sessions Judge refused to enforce the attendance of such witnesses on the ground that the application should have been made at an earlier date and not after the examination of the witnesses present, the High Court on appeal set aside the conviction and sentence, holding that the trial was vitiated.²¹⁶ Where the accused does not give a list of witnesses under S. 211, but files the list some days before the trial commenced, a refusal to adjourn the case to procure the attendance of an untraceable witness is justified.²¹⁷ Where the accused stated that they would not examine any defence witnesses, but requested the Judge when the case had come to an end, to call a defence witness but they had sufficient time to procure his attendance earlier ; *held*, that the refusal of the Judge to do so was justified.²¹⁸

The question in all such cases is a question of exercise of a sound judicial discretion. So in a recent case [*Hote* (1935) 37 Cr. L. J. 108 : A. I. R. 1935 S. 216] it has been held

211. *Lucky Narain* (1875) 24 W. R. 18.

212. *Nageshwar* (1922) 24 Cr. L. J. 518 : A. I. R. 1923 O. 142 : 73 I. C. 54.

213. *Brojendra* (1902) 7 C. W. N. 188 ; *Rajcoomar* (1871) 16 W. R. 14.

214. *Ishan* (1871) 15 W. R. 34 ; *In re Bholanath* (1871) 16 W. R. 28 ; *Rajnarain* (1872) 18 W. R. 20 ; *Prosunno* (1875) 23 W. R. 56 ; *Jumiruddin* (1875) 23 W. R. 58 ; *Muniammal* (1882) 2 Weir 383 ; *Ram Mamud* (1930) 58 C. 412 ;

34 C. W. N. 1014 : 32 Cr. L. J. 316 : A. I. R. 1931 C. 6 : 129 I. C. 353.

215. *Virasami* (1896) 19 M. 375 : 6 M. L. J. 195.

216. *Fojjuddi* (1920) 47 C. 758 : 24 C. W. N. 527 : 21 Cr. L. J. 842 : 58 I. C. 922.

217. *Nazir Singh* (1925) 7 L. L. J. 428 : 27 Cr. L. J. 134 : A. I. R. 1925 L. 557 : 91 I. C. 806.

218. *Jamal Momim* (1924) 1925 P. 29, 32 : 26 Cr. L. J. 713 : A. I. R. 1925 P. 381 : 86 I. C. 153.

that the Sessions Judge is not justified in refusing to exercise his discretion to summon defence witnesses merely and solely on the ground that the accused had not availed himself of the opportunity afforded by S. 211 Cr. P. C. ; if an application for summoning witnesses is made at a late stage of the proceedings necessitating an adjournment and is made with the object of delaying the trial or is otherwise not *bona fide*, and if the evidence of witnesses who are sought to be summoned is not material to the case, the order rejecting the application would no doubt be justified. But when the application for summoning witnesses is made about two months before the trial, and the witnesses are all local witnesses and their evidence is material to the defence and there is nothing on the record to show that the application is made for any ulterior motive, the application should be allowed. The cause of justice demands that an accused person should have the fullest opportunity to lay his case before the Court.

As to adjournment of trial, *see* S. 344 ; and as to the attendance of Jury or assessor at the adjourned sitting, *see* S. 295. *See* Notes under heading "Adjournment of trial", *post*.

Under S. 540, the Sessions Judge can, at any stage of a trial, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to him essential to the just decision of the case. So, where the accused is not entitled as of right to have a witness summoned, he may on proper materials ask the Court to summon him as a Court witness.

16. Prosecutor's Right of Reply (S. 292).—

By S. 79 of Act XVIII of 1923, the present Section has been substituted for the old one which ran as follows :—

"If the accused or any of the accused adduces any evidence, the prosecutor shall be entitled to reply".

Previously, there was a conflict of decisions as to the prosecutor's right of reply when the accused put in a document through a prosecution witness, during his cross-examination, though the accused stated under S. 289 that he did not mean to adduce evidence.²¹⁹ Under the present Section the prosecutor shall have no right of reply in such case. The prosecutor shall have this right only when the accused, or one of the accused, adduces any *oral* evidence.²²⁰ Even under the old Section it was held

219. *See* Hurry Churn (1883) 10 C. 140 : 13 C. L. R. 358, Grees Chunder (1884) 10 C 1024, Kaliprosunno (1886) 14 C. 245, Solomon (1890) 17 C. 930, Krishnaji (1890) 14 B. 436 for one view ; and Hayfield (1892) 14 A. 212 : 12 A. W. N. 63, Moss (1893) 16 A. 83 : 14

A. W. N. 23, Venkatapathi (1888) 11 M. 339 : 2 Weir 380, Robert Stewart (1904) 31 C.1050 : 8 C. W. N. 528 : 1 Cr. L. J. 451, Bhaskar (1906) 30 B. 421 : 4 Cr. L. J. 1 for the other.
220. Kundan (1931) 32 Cr. L. J. 944 : A. I. R. 1931 L. 534 : 132 I. C. 692.

that it was never meant by the legislature that the prosecutor should have a reply when no witnesses were called for the defence, the object of the law being evidently to let each side have an opportunity of commenting on the evidence of the other, and not to give an additional advantage to the prosecutor in a case where the accused at first said that he meant to adduce evidence, but on the following day he said that, on reconsideration, he did not intend to call witnesses.²²¹ As regards documentary evidence, if any such document is tendered in evidence by the accused before he is called upon to enter on his defence, as for instance in the course of the cross-examination of the prosecution witnesses, the prosecutor has got no right of reply; but if such document is produced and tendered in evidence after the accused enters on his defence, and the document be of such a nature that no witness is required to prove it—the presumption, allowed by law, dispensing with the necessity of formal proof—the prosecutor shall be entitled to reply, with the permission of the Court, but he is confined to comment on the document only, unless the Court allows him further latitude. As to documents which the Court shall presume to be genuine, see Evidence Act, Ss. 79-90.

Admission in evidence of depositions of witnesses before the Committing Magistrate, on the application of the accused, under S. 288 of the Code, will not entitle the prosecutor to have a right of reply.²²²

When a point of law is raised by the defence, the prosecutor shall have the right to reply on that point, with the permission of the Court.

An erroneous decision as to the right of reply cannot be treated as such an irregularity or such a substantial irregularity as to vitiate the whole proceedings and to call for a retrial.²²³

The practice of receiving from the pleaders of the parties written notes of argument after a case has been heard is most reprehensible. Where such written notes were accepted and then additional notes were accepted from the prosecution and it appeared that the defence had no opportunity for meeting the points raised therein: *Held*, that the trial was invalidated. [*Jogendra v. Rabintra*, (1936) 40 C. W. N. 863].

17. Local Inspection by Jury or Assessors (S. 293), and by Judges (S. 539. (B).) —

Section 293 speaks of the view of the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, by the Jury or assessors. While the new Section 539 B speaks of the view of such place by the Judge. The object for which the visit is to be made is not specified in S. 293, but in S. 539B it is specified as "for the purpose of properly appreciating the evidence" given at such trial.

221. *Hurry Churn* (1883) 10 C. 140 : 13 C. L. R. 358. See also *Bhaskar* (1906) 30 B. 421 ; 8 Bom. L. R. 421 : 4 Cr. L. J. 1.

222. See *Kundan* (1931) 32 Cr. L. J. 944 : A. I. R. 1931 L. 534 : 132 I. C. 692.

223. *Ibid.*

The visit in either case must be before the opinions of the assessors or the verdict of the Jury has been recorded.²²⁴ Once the assessors gave their opinions, it only remained for the Judge to give judgment under S. 309 (2).²²⁵ The new Section 539B has been inserted by S. 150 of Act XVIII of 1923, and runs as follows :—

“S 539 B. (1) Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without unnecessary delay, record a memorandum of any relevant facts observed at such inspection.

(2) Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost :

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such Jury or assessor are also allowed a view under S. 293”.

The new Section adopts the general effect of the previous judicial decisions on the subject and provides, as safeguards, notice to the parties and placing on the record a memorandum of any relevant facts observed at such inspection.²²⁶

Local inspection is permitted only to appreciate evidence, it cannot take the place of evidence itself.²²⁷ Local inspection should not be held before the recording of evidence.²²⁸ Where the evidence is conflicting or is difficult to be understood by a person not acquainted with the locality, a Magistrate should go and see the locality for himself. A Magistrate does not make himself a witness by going to a place and viewing it for the purpose of understanding the evidence, any more than does a Judge in England who goes to view a place or do jury-men who view a place under an order, make himself or themselves witnesses in the case.²²⁹ But if the local inspection was made not for the purpose of understanding the evidence but for the purpose of obtaining information which did not appear from the evidence of the witnesses, the Magistrate or Judge made himself a witness in the case and the procedure was quite irregular and vitiated the trial.²³⁰

224. Oudh Behari (1877) 1 C. L. R. 143.

225. Daiya (1916) 9 Bur. L. T. 133 : 17 Cr. L. J. 500 : 36 I.C. 468.

226. Pakir Muhammad (1926) 4 R. 106, 108, 109 : 27 Cr. L. J. 1084 : A. I. R. 1926 R. 180 : 97 I. C. 60 ; Forbes V. Ali Haidar (1925) 53 C. 46, 49 : 42 C. L. J. 131 : 26 Cr. L. J. 1524 : A. I. R. 1925 C. 1246 : 50 I. C. 308.

227. Tirkha V. Nanak (1927) 49 A. 475 : 28 Cr. L. J. 291 : A. I. R. 1927 A. 350 : 100 I. C. 371 (following Ram Sahai V. Dwarka (1920)

22 Cr. L. J. 424 : 61 I. C. 712). *See also* Nogendra (1915) 19 C. W. N. 923 : 21 C. L. J. 396 : 16 Cr. L. J. 576 : 30 I. C. 128 ; Hari Kishore (1894) 21 C. 920, 928.

228. Babbon (1909) 37 C. 340, 345 : 14 C. W. N. 422 : 11 C. L. J. 335 : 11 Cr. L. J. 121 : 5 I. C. 365.

229. *In re Lalji* (1897) 19 A. 302 : 17 A. W. N. 52.

230. Fakira Mahanti (1928) 29 Cr. L. J. 656 : A. I. R. 1928 P. 567 : 110 I. C. 112 ; Hari Mohan (1928) 30 Cr. L. J. 491 : 115 I. C. 556 (P).

The Magistrate cannot base his decision entirely on the local inspection, apart from the recorded evidence.²³¹ A case cannot be decided merely on an observation made by the Court locally. But if on looking at a place in order to understand the evidence, the Magistrate thereby understands that the description of the place given in the evidence is erroneous or false, he is not precluded from holding that the facts as stated by the witnesses who gave that description are not proved, and in so holding he does not make himself a witness but acts as a Judge deciding on matters before him.²³² Where there is a dispute as to the exact spot where the occurrence is said to have taken place, the Magistrate will be wise to defer his visit until he has heard the whole of the evidence.²³³

18. Notice of Local Inspection to the parties.—

The Judge or Magistrate should be usually accompanied by the parties and their pleaders.²³⁴ In holding a local investigation, a Magistrate ought to take great care to see that he is not approached by an outsider or does not allow his mind to be affected by outside matters. The proper thing for him to do is to be attended by a representative of either side for the purpose of identifying the points which are material to the case on the one side and the other, and he ought not to allow himself to enter into general conversation with the people of the neighbourhood about the case. Where the finding of fact is based partly on local inspection held not according to law, the High Court in revision held that that finding was vitiated.²³⁵ When a Magistrate goes to view a place for the purpose of understanding the evidence he should be careful not to allow any one on either side to say anything which might prejudice his mind one way or the other.²³⁶ A Judge should not visit the place of occurrence without notice to the parties and assessors.²³⁷ Convictions were set aside when he had examined witnesses orally,²³⁸ ascertained facts of the occurrence²³⁹ or conversed indiscriminately with people present on the spot.²⁴⁰

19. Record of memorandum of relevant facts observed at Inspection.—

This provision follows the judicial decisions noted at the foot-note ; only it makes the note obligatory under the law.²⁴¹ The omission to make such a record now vitiates the trial and

231. Babbon (1909) 37 C. 340, 347, 348 : 14 C.W. N. 422 : 11 C. L. J. 335 : 11 Cr. L. J. 121 : 5 I. C. 365 ; Moinuddin (1921) 2 P. L. J. 455 : 22 Cr. L. J. 442 : 61 I. C. 794.

232. Aliar Rai v. Jhingur (1912) 39 C. 476 : 16 C. W. N. 426 : 15 C. L. J. 403 : 13 Cr. L. J. 156 : 13 I. C. 844 [distinguishing Babbon (1909) 37 C. 340 : 14 C. W. N. 422 : 11 C. L. J. 335 : 11 Cr. L. J. 121 : 5 I. C. 365.]

233. Hari Kishore (1894) 21 C. 920.

234. Manikam (1896) 19 M. 263, 266 ; Nogendra (1915) 19 C. W. N. 923 : 21 C. L. J. 396, 407 : 16 Cr. L. J. 576 : 30 I. C. 128.

235. Chandra v. Mohendra (1916) 44 C. 711 : 21

C. W. N. 549 : 25 C. L. J. 66 : 18 Cr. L. J. 477 : 39 I. C. 317. See also Aliar Rai v. Jhingur (1912) 39 C. 476 : 16 C. W. N. 426 : 15 C. L. J. 403 : 13 Cr. L. J. 156 : 13 I. C. 844.

236. In re Lalji (1897) 19 A 302 : 17 A. W. N. 52.

237. Oudh Behari (1877) 1 C. L. R. 143.

238. Kundro (1908) 12 C. W. N. cliii.

239. Debi Singh (1910) 14 C. W. N. xcix ; Satri Dulali (1899) 3 C. W. N. 637.

240. Chandra. v. Mohendra (1916) 44 C. 711 : 21 C. W. N. 549 : 25 C. L. J. 66 : 18 Cr. L. J. 477 : 39 I. C. 317.

241. Babbon (1909) 37 C. 340, 356, 357 : 14 C. W.

is not an irregularity curable in the absence of prejudice.²⁴² But this case has been dissented from in a Bombay case²⁴³ and has been distinguished in a later Calcutta case.²⁴⁴ The Bombay case holds that there is no universal rule that disobedience of a mandatory provision is to nullify all proceedings irrespective of prejudice. It is very desirable that a judicial officer conducting a local inspection should place upon the record the result of his inspection at once, so that the parties may have an opportunity of seeing what the facts are which the judicial officer considers established by the local inspection and he should never deliver his judgment relying upon that investigation without giving an opportunity to the parties to rebut his opinion.²⁴⁵ That was also the view of Chatterjea and Woodroffe, JJ. in *Babbon Sheikh v. E.* noted *ante*, who observed that no man could be convicted except upon evidence which he had an opportunity of testing by cross-examination and contradicting by rebutting evidence. The object of the Legislature seems to be to provide for this opportunity for contradiction, by enacting the necessity of recording the observations. It should be noticed however that no such provision has been made where the inspection is held by the jurors or assessors. A Judge, however, cannot under S. 539B, make a local inspection unless the Jury or assessors are allowed a view under that Section. Where the Judge alone inspects the spot under S. 539B, the inspection note must be ruled out.²⁴⁶ Where no opportunity was given to the party to rebut an impression formed at the local inspection, conviction on evidence vitiated by such impression is unsustainable.²⁴⁷ The result of the Court's observations of the locality, though not evidence within S. 3 of the Evidence Act, is "matter before the Court" within the definition of "proved",²⁴⁸ and so this may be one of the grounds for its decision.

20. When a Juror or Assessor or a Judge may be examined. —(S. 294).

S. 294 provides that if a juror or assessor is personally acquainted with any relevant facts, he must be examined and cross-examined as a witness.²⁴⁹ He must base his finding

- N. 422 : 11 C. L. J. 335 : 11 Cr. L. J. 121 : 5 I. C. 365 ; *Aliar Rai v. Jhingur* (1912) 39 C. 476, 486 : 16 C. W. N. 426 : 15 C. L. J. 403 : 13 Cr. L. J. 156 : 13 I. C. 844 ; *Forbes v. Ali Haidar* (1925) 53 C. 46, 49 : 42 C. L. J. 131 : 26 Cr. L. J. 1524 : A. I. R. 1925 C. 1246 : 90 I. C. 308.
242. *Hriday Govinda* (1924) 52 C. 148 : 40 C. L. J. 149 : 25 Cr. L. J. 1375 : A. I. R. 1924 C. 1035 : 82 I. C. 767. *See also* *Musa* (1928) 30 Cr. L. J. 333 : A. I. R. 1929 N. 233 : 114 I. C. 609 ; *Jodhraj* (1926) 28 Cr. L. J. 180 : A. I. R. 1927 N. 397 : 99 I. C. 852 ; *Jowala Singh* (1928) 10 L. 138 : 29 Cr. L. J. 719 : A. I. R. 1928 L. 479 : 110 I. C. 463.
243. *Khaushal Jeram* (1926) 50 B. 680 : 27 Cr. L. J. 1151 : A. I. R. 1926 B. 534 : 97 I. C. 671 (following *Forbes v. Ali Haidar* (1925) 53 C. 46 : 42 C. L. J. 131 : 26 Cr. L. J. 1524 : A. I. R. 1925 C. 124 : 90 I. C. 308).

244. *Forbes v. Ali Haidar* (1925) 53 C. 46 : 42 C. L. J. 131 : 26 Cr. L. J. 1524 : A. I. R. 1925 C. 124 : 90 I. C. 308 (This was a case under S. 145 of the Code.)
245. *Jowala Singh* (1928) 10 L. 138 : 29 Cr. L. J. 719 : A. I. R. 1928 L. 479 : 110 I. C. 463 ; *Ramrup* (1921) A. I. R. 1921 P. 471 ; *In re Thackroth* (1923) 45 M. L. J. 279 : 25 Cr. L. J. 7 : A. I. R. 1923 M. 694 : 75 I. C. 695.
246. *Raj Bahadur* (1934) 11 O. W. N. 1309 : 35 Cr. L. J. 1496 : A. I. R. 1934 O. 499 : 152 I. C. 103.
247. *In re Kader Batcha* (1927) 54 M. L. J. 442 : 29 Cr. L. J. 539 : A. I. R. 1928 M. 484 : 109 I. C. 363.
248. *Aliar Rai v. Jhingur* (1912) 39 C. 476, 482, 483 : 16 C. W. N. 426 : 15 C. L. J. 403 : 13 Cr. L. J. 156 : 13 I. C. 844 [following *Jay Coomar v. Bundhoo Lall* (1882) 9 C. 363 (Civil case.)]
249. *Babbon* (1909) 37 C. 340 : 14 C. W. N. 422 :

on the evidence given at the trial, and not on personal knowledge without giving evidence.²⁵⁰ A person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons exercising similar judicial functions sitting with him at the same time. So a Sessions Judge is a competent witness, and the giving of evidence by him does not preclude him from dealing judicially with the evidence of which his own forms a part. A prisoner has a right to ask to have the evidence of a Sessions Judge, who is trying him, taken on a point which he thinks makes in his favour. A Sessions Judge, who makes a complaint before a Magistrate, is not incompetent afterwards to try it without the aid of a Jury, if he has no personal or pecuniary interest in the subject of the charge.²⁵¹ In that case it was observed by Norman, J. :—"No doubt it is extremely inconvenient that a Judge sitting without a Jury should try a case in which he himself is the complainant and the principal witness. I should have no doubt that if he has any personal or pecuniary interest in the subject of the charge, he is disqualified from trying it. But if that is not the case, if the Judge, in making the complaint, has acted merely in the discharge of his duty as a public officer, I think we must say he is not incompetent to try the case".

A Sessions Judge should state his interest in a case at the very beginning and not when the time came to write or dictate a judgment. When a consideration of the facts of the case and of their applicability to a particular Section of the law are left to the end, a trial is bound to suffer and often a decision is arrived at in conflict with the law.²⁵² A Judge should not import his own knowledge into his judgment, and if he wishes to rely on facts within his knowledge he must go into the witness-box and depose them on oath; but that does not prevent a Judge looking at exhibits produced in Court and partly basing his judgment on them.²⁵³ A Court can take judicial notice of matters of universal notoriety, its general knowledge of daily life; but he cannot use from the Bench under the guise of judicial knowledge that which he knows as an individual observer; he cannot, therefore, import into a case his knowledge of the previous conduct of the accused.²⁵⁴ It is a fundamental principle of the due administration of justice that Judges and Magistrates should not only be fair and impartial, but also should *appear* to reasonable persons to be fair and impartial, and that neither accused persons nor litigants should have any reasonable ground for supposing that the Judge or Magistrate who is trying a case in which they are concerned is biased either in their favour or against them.²⁵⁵ When one of the assessors expressed during the course of the trial that he was determined to help the accused; *held*

11 C. L. J. 335: 11 Cr. L. J. 121: 5 I. C. 365.

250. Tirumal Reddi (1901) 24 M. 523, 543: 2 Weir 340.

251. Mookta Singh (1870) 13 W. R. 60.

252. Suraj Prasad (1930) 32 Cr. L. J. 158: A. I. R. (1930) A. 534: 128 I. C. 601.

253. S. C. Gupta (1923) 1 R. 290: 25 Cr. L. J. 185: A. I. R. 1924 R. 17: 76 I. C. 425.

254. Shambhuram (1931) 25 S. L. R. 213: 32 Cr. L. J. 923: A. I. R. 1931 S. 127: 131 I. C. 476.

255. Vellu Thevar (1932) 10 R. 180: 33 Cr. L. J. 550: A. I. R. 1932 R. 90: 137 I. C. 675; Nga Win (1934) 36 Cr. L. J. 1362: A. I. R. 1934 R. 105: 151 I. C. 615.

that he was not a proper person to act as an assessor and that in such a case the High Court has power under S. 561-A to order a new trial with the help of a new assessor.²⁵⁶ The verdict obtained on a trial, in the course of which the Judge finds that the jurors were biased in favour of the prosecution and that they were influenced by their private knowledge based on what they had heard outside Court, cannot be sustained.²⁵⁷

21. Adjournment of trial.—Attendance of jurors or assessors.—(S. 295).

S. 344 provides,—

“(1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

“(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate”.

As to the postponement of the commencement of trial, *see* Notes under heading, “Commencement of the proceeding in the Court of Sessions or High Court”, in Ch. I of Pt. II, *ante*.

An adjournment on account of the absence of the principal witnesses for the prosecution in a Session trial for the purpose of enforcing their attendance may be granted.²⁵⁸

As to adjournment of trial on account of the absence of defence witnesses, *see* Notes under heading, “Summoning of defence witnesses (S. 291)”, *ante*.

There may be other causes for an adjournment, as for instance, where the Judge thinks that the Jury or assessors should visit the place of occurrence (S. 293), or that he himself should do so for the purpose of appreciating the evidence (S. 539 B).

Then again, under Sub.-s. (8) of S. 526 if in any trial any party interested intimates to the Court at any stage before the defence closes its case, that he intends to make an application for transfer under Section 526, the Court may adjourn the case for such a period as will afford sufficient time for the application to be made to the High Court and an order to be obtained thereon. This is made subject to the provision in Sub.-s. (9) which states that a Sessions Judge shall not be required to adjourn a trial under Sub.-s. (8) if he is of opinion that the person notifying his intention of making an application under this Section has had a reasonable

256. Lal Singh (1933) 15 L. 20 : 35 Cr. L. J. 107 : A. I. R. 1933 L. 926 : 146 I. C. 446.

257. Dharanidhar (1933) 59 C. L. J. 15 : 35 Cr. L. J. 1311 : A. I. R. 1934 C. 432 : 151 I. C. 365.

258. Sader Saik (1925) 30 C. W. N. 190 : 27 Cr. L. J. 125 : A. I. R. 1926 C. 584 : 91 I. C. 701 ; In re Puban (1866) 2 W. R. Cr. 10.

opportunity of making such an application and has failed without sufficient cause to take advantage of it.

Under S. 526 as amended by Act. XXI of 1932 (in view of the observations made by Lord-Williams, J. in *Neamat Shah v. E.*)²⁵⁹, when once a party has secured an adjournment the Court shall not be bound to adjourn on any subsequent intimation of an intention to apply for a transfer made by that same party, and when there are more than one accused it shall not be possible for different accused by a series of successive intimations to secure a series of adjournments. To mitigate any hardship that might be caused by the above provision, an explanation has been added which states :—"Nothing contained in Sub-s. (3) or Sub-s. (4) restricts the power of a Court under S. 344."

The Court has a discretion in the matter of granting adjournments. A reasonable ground is not in itself sufficient for adjournment.²⁶⁰ The intention of the Criminal Procedure Code is that a trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish and that it is inexpedient for a Sessions trial to be adjourned except only on the strongest possible ground and for the shortest possible period.²⁶¹ The trial once begun should be continued *de die en diem* until it is finished, except for very good reasons.²⁶²

When a trial is adjourned, the Jury or the assessors shall attend at the adjourned sitting and at every subsequent sitting until the conclusion of the trial (S. 295). A Sessions Judge cannot for the absence of a witness discharge the Jury and direct that a fresh trial be held.²⁶³

Failure on the part of a juror or assessor to attend after an adjournment of the Sessions Court, after having ordered to attend, renders the juror or assessor liable to a fine not exceeding one hundred rupees, or, in default of recovery of fine by attachment and sale of his moveable property, to imprisonment by order of the Court in Civil Jail for the term of 15 days, unless such fine is paid before the end of the term (S. 332). In the case of a trial before the High Court, such failure to attend renders a juror liable to fine as for a contempt, and, on default of payment, to imprisonment for a term not exceeding six months in the Civil Jail until the fine is paid (S. 318).

As to the procedure when a juror ceases to attend, see S. 282; and where an assessor ceases to attend, see S. 285 and Notes in Ch. IV, *ante*.

22. Continuation of a trial by the Successor of the Judge.—

The Code of Criminal Procedure does not empower a Sessions Judge to try a case partly on evidence not recorded by himself, and the consent on the part of the accused

259. (1931) 59 C. 478; 35 C. W. N. 1112; 55 C. L. J. 34; 33 Cr. L. J. 31; A. I. R. 1931 C. 626; 134 I. C. 1057.

260. *Ali Sher v. Mir* (1924) 26 Cr. L. J. 958; A.I.R. 1925 S. 315; 87 I. C. 110.

261. *Badri Prasad* (1912) 35 A. 63; 13 Cr. L. J. 861; 17 I. C. 797.

262. *Ram Sarup* (1918) 17 A. L. J. 48; 20 Cr. L. J. 127; 49 I. C. 111.

263. *In re Putaswamy* (1920) 4 Bom L. R. 939.

cannot vest in him a jurisdiction to do so. S. 350 of the Code applies only to cases tried by Magistrates.²⁶⁴ The power given by the Criminal Procedure Code to pronounce a judgment upon evidence partly recorded by his predecessor and partly by himself does not extend to a Session Judge. Such proceedings are void.²⁶⁵ The consent of the accused would not cure it.²⁶⁶

23. Locking up Jury.—(S. 296).

By the practice of the Supreme Court of Bombay before the Indian Penal Code came into operation, on a trial for treason or felony, the Jury (as in England) were kept together in the night under the charge of officers of the Court ; but on a trial for misdemeanour it was in the discretion of the Judge whether they should be kept together or allowed to return to their homes for the night, the latter being generally done ; and after the Code came into operation, the practice continued the same, as well in the Supreme Court as subsequently in the High Court, the Judges applying the rule by determining whether the offence, under the old rule, would have been a felony or a misdemeanour. The question arose in a case tried by Anstey, J. in the Third Criminal Sessions, 1865, of the Bombay High Court, where in a trial held on a charge under S. 467 I. P. C. the Judge permitted the Jury to separate on the first day of the trial and before verdict, The case came before Couch, C. J., and Arnould, Westropp and Sargeant, JJ.) on a certificate by the Advocate General. The practice was explained in the judgment of the High Court in that case²⁶⁷ delivered by Couch, C. J. which was as follows :—

“The trial in this case took place when the original Letters Patent constituting the High Court, dated the 26th of June 1862, were in force. By the 38th clause of those Letters Patent it was ordained that the proceedings in all criminal cases which should be brought before the High Court in the exercise of its ordinary original criminal jurisdiction, and also in all other criminal cases over which the Supreme Court then had jurisdiction should be regulated by the procedure and practice then in use in the Supreme Court.

“The Letters Patent of the 28th of December 1865, by virtue of which the High Court now exercises its jurisdiction, continue this by ordaining in clause 38 that the proceedings in such criminal cases shall be regulated by the procedure and practice which was in use in the High Court immediately before their publication, subject to any law which had been or might be made in relation thereto by competent legislative authority for India.

“Now, the practice of the Supreme Court, upon the adjournment of a criminal trial before the Indian Penal Code came into operation, was the same as the practice of the Courts of England. That practice was that the Jury on a trial for treason or felony were kept together during the night under the charge of officers of the Court ; but on a trial for misdemea-

264. Sakharani (1901) 26 B. 50 : 3 Bom L. R. 558 ;
Durga (1908) 8 C. L. J. 59 : 8 Cr. L. J. 121.

265. Tarada (1881) 3 M. 112 : 2 Weir 430.

266. Raghoonath (1875) 23 W. R. 59 ; Gopi Noshya
(1874) 21 W. R. 47.

267. Dayal Jairaj (1866) 3 Bom. H. C. R. 20.

nour it was in the discretion of the Judge, whether they should be kept together or should be allowed to return to their homes for the night, the latter being generally done; *Rex. v. Kennear*.²⁶⁸ From this case it appears that this had become the practice in the year 1819; and it has continued to be so to the present time.

"In the Indian Penal Code there is no such division of offences as that of felonies and misdemeanours, the word "offence" being used to denote anything made punishable by the Code, and the gravity of the offence being measured only by the punishment which may be awarded for it; but we have the authority of two of the members of this Court, one of whom was a Judge of the Supreme Court and the other the leading counsel in the Court, for saying that the practice of the Supreme Court continued to be the same after the Indian Penal Code came into operation, and that the Judges applied the rule by determining whether the offence under trial would, by the old law, have been a felony or a misdemeanour. Except in the few cases where a new offence is created by the Penal Code—and these may well be left in the discretion of the Judge—there is no difficulty in doing this; and it is always in the power of the Judge, by the exercise of his discretion, to prevent any anomaly that might be caused by a rigid application of the rule.

"The offence with which the accused were charged in this case was, under the law which was in force before the Indian Penal Code took effect, only a misdemeanour, as the instrument forged did not come within the description of any of the instruments in S. 72 of the 9 Geo. IV. c. 74, the forgery of which was a felony. It is true that by virtue of S. 467 of the Penal Code, and the definition in S. 30 of the words "valuable security," the punishment for it is now the same as for the offence described in the 9 Geo. IV. c. 74 and that the Court has power to adjudge the forfeiture of the rents and profits of the moveable and immoveable estate of the convict during the period of his transportation or imprisonment; but that does not make the offence a felony; 1 Hawk. P. C., bk. 1, c. 7, s. 6.

"It is still possible to apply the rule of practice of the Supreme Court, and we are bound by the Letters Patent to apply it. According to that practice, it was in the discretion of the Judge in such a case as the present, whether he should allow the jury to separate; the exercise of his discretion is not a matter to be reviewed by this Court under S. 26 of the Letters Patent, there being no error on any point of law. If any authority were necessary for this proposition, it is to be found in the judgment of the Judges in the case of *Winsor v. The Queen* and the cases there referred to.²⁶⁹

"We, therefore, hold that no good cause has been shown in this case for our reversing the conviction."

The fact that a juror had conversation with a stranger during the adjournment of the Court before the Judge's charge is concluded is not a sufficient ground for interference.²⁷⁰

268. 2 B. & Ald 462.

269. L. R. I. Q. B. 289, affirmed by the Ex. Cham. in Error in L. R. I. Q. B. 390.

270. In re Puli Subba Reddi (1919) 20 Cr. L. J. 790 : 53 I. C. 694 (M.).

Leaving aside cases referred to in SS. 293 and 300 Cr. P. C. the Jury are entitled to talk to persons connected with the accused during the progress of the trial.²⁷¹ Where in a trial by Jury, after the conclusion of the evidence and the address of the Public Prosecutor, one of the jurors expressed his opinion outside Court as to the guilt of the accused, and the Sessions Judge, although informed of the fact, proceeded with the trial, took the verdict of the Jury and having differed from it made a reference under S. 307 Cr. P. C. ; *held*, that the juror had precluded himself from continuing as a juror and that there should be a fresh trial before a fresh jury.²⁷² There is nothing illegal in adjourning a case after the Government Pleader and the Pleader for the accused have addressed the Jury, and there is no provision in law for a fresh address on the resumption of the hearing.²⁷³

Where before the summing up the members of the Jury had conversed with witnesses for the prosecution and it was ascertained that there was in fact no prejudice to the accused, the conviction could stand (*Twiss* (1918) 2 K. B. 853 : 13 Cr. A. R. 177, distinguishing *Ketteridge* (1915) 1 K. B. 467 : 11 Cr. A. R. 54).

Where the Jury, who were 9 in number, retired to consider their verdict and at 4 p.m. 5 of them came out and sat in Court and the remaining 4 came out at 4-30 p.m. and the Jury then gave the verdict : *held*, that the verdict was not a legal verdict as the Jury had separated before they returned their verdict and the accused had thereby been deprived of their joint consultation and consideration (*R. v. O' Connel*, 1 Cox C. C. 410 referred to). The rule against separation of the Jury has a great deal of common sense in it and it should be strictly adhered to.²⁷⁴

The history of the law as to separation of juries was fully considered in *Ganshaw v. Knobles*.²⁷⁵

271. Bhuban Chandra (1927) 55 C. 279 : 31 C. W. N. 828 : 28 Cr. L. J. 783 : A.I.R. 1927 C. 628 : 104 I. C. 111.

272. Nazir Ali (1920) 25 C. W. N. 240 : 33 C.L.J. 122 : 22 Cr. L. J. 510 ; 62 I. C. 334.

273. Sur Nath (1927) 50 A. 365 : 28 Cr. L. J. 950 : A. I. R. 1927 A. 721 : 105 I. C. 662.

274. Kaseruddin (1930) 31 Cr. L. J. 1090 : A. I. R. 1930 C. 446 : 126 I. C. 753.

275. (1916) 2 K. B. 538, C. A.

CHAPTER VII.

F—Conclusion of Trial in Cases tried by Jury—Ss. 297-299.

Charge to Jury.

S. 297. In cases tried by jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

S. 298. (1) In such cases it is the duty of the Judge—

- (a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;
- (b) to decide upon the meaning and construction of all documents given in evidence at the trial;
- (c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;
- (d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact, or upon any question of mixed law and fact, relevant to the proceeding.

Illustrations.

- (a) It is proposed to prove a statement made by a person not being a witness in the case, on the ground that circumstances are proved which render evidence of such statement admissible.
It is for the Judge and not for the jury, to decide whether the existence of those circumstances has been proved.

- (b) It is proposed to give secondary evidence of a document the original of which is alleged to have been lost or destroyed.
It is the duty of the Judge to decide whether the original has been lost or destroyed.

S. 299. It is the duty of the jury—

- (a) to decide which view of the facts is true and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned;
- (b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not;
- (c) to decide all questions which according to law are to be deemed questions of fact;
- (d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

- (a) A is tried for the murder of B.

It is the duty of the Judge to explain to the jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the jury to decide which view of the facts is true and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

- (b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury.

List of Headings :—

1. Charge to the Jury—Summing up—Misdirection.
2. Whether the Judge should express his own opinion on questions of fact to the Jury.
3. What sort of summing up is helpful to the Jury.
4. How the evidence is to be dealt with, generally.
5. Directions as regards discrepancies.
6. Directions as to quantum of proof.
7. Directions on circumstantial evidence.
8. Directions on question of identification of the accused.
9. Directions in cases where there are several accused persons.
10. How to deal with the defence.
11. How to lay down the law.
12. Discussion on question of law—Reference to Judicial decisions, treatises and text-books.
13. Judge to decide on the relevancy or otherwise of the evidence.
14. Judge to decide on the meaning and construction of documents.
15. Directions as to onus of proof.
16. Directions on the benefit of the doubt.
17. Recording Heads of Charge to Jury.
18. How the Charge is to be delivered.

Division F of Chapter XXIII of the Code deals with the conclusion of the trial in a case tried by Jury and consists of Ss. 297-307. We shall deal with S. 307 in Part IV. The other Sections will be dealt with in this Part in two Chapters, viz. (1) Respective duties of the Judge and Jury, including Judge's charge to the Jury (Ch. VII), and (2) Verdict (Ch. VIII). The Sections bearing on the present Chapter are Ss. 297-299.

These Sections should be read together to understand the respective functions of the Judge and the Jury in cases tried by Jury. Sub-sec. (1) of S. 298 relates to the duty of the Judge *in the course of the trial*, while S. 297 and Sub-sec. (2) of S. 298 relate to the duty of the Judge *at the conclusion of the trial*. S. 299 allocates to the Jury the matters which they have the exclusive privilege to decide in order to enable them to give their verdict. Shortly stated, the Judge's duty is to decide on all questions of law, that of the Jury is to decide on all questions of fact.

The last or the concluding stage of a Jury trial is when, after the case for the defence and the prosecutor's reply (if any) are concluded, the Judge delivers his charge to the Jury and the Jury thereafter pronounce their verdict. As to the case for the defence and the

prosecutor's reply, see Notes under the preceding Chapter. We shall now proceed to deal with the matter of Charge to the Jury.

1. Charge to the Jury—Summing up—Misdirection.

This is a most important function in a Jury trial. On the proper carrying out of the Judge's duty in this respect depends the finality of the Jury's verdict, for, in declaring the powers of the appellate Court, S. 423 (2) of the Code says that nothing contained therein shall authorise the Court to alter or reverse the verdict of a Jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury of the law as laid down by him ; and S. 537 of the Code provides that no finding, sentence or order of a Court of competent jurisdiction shall be reversed or altered on appeal on account of any misdirection in any charge to a Jury, unless the misdirection has, in fact, occasioned a failure of justice.

MISDIRECTION.—

In every trial two matters come up for consideration, viz., what are the facts in the case, and whether they disclose any offence. The Judge's charge has necessarily to deal with both these matters. To help the Jury to decide on matters of fact, the Judge has to sum up the evidence for the prosecution and for the defence ; and to enable the Jury to apply the law to the facts proved by them, the Judge has to explain the law to them. S. 298 (1) and S. 298 (2) lay down the duty of the Judge in respect of the summing up of evidence and the laying down the law ; but they do not go into details and are not exhaustive, and so they should be read in conjunction with the judicial decisions on the subject.¹

Misdirection is of two kinds : positive misdirection and non-direction ; or, as they are commonly called, errors of commission and errors of omission respectively. From the very nature of things it is patent that positive misdirection can be more easily avoided than non-direction. As regards non-direction there is a distinction in English Law between non-direction on the law and non-direction on facts. Non-direction on the law amounts to misdirection where the omission is in respect of a relevant legal direction which is likely to produce injustice ; and such omission is generally due to inadvertence and sometimes also to misunderstanding of the law by the Judge. Where non-direction of law amounts to misdirection it is a "wrong decision on any question of law" within the meaning of Section 4 of the Criminal Appeal Act of 1907, and the Court will quash the conviction unless the prosecutor can show that the Jury would have come to the same conclusion even if they had been properly directed.² Non-direction on the facts comes under the Court's general power to quash a conviction which may be exercised only where there has been a miscarriage of justice, which means that the defence must establish that the non-direction was such that the Jury, on a proper direction, might fairly and reasonably have found the prisoner not guilty.³ As regards non-direction on the facts, Brett, M. R.⁴ laid down the principle, in

1. *Nehru Mal* (1927) 2 Luck 597 : 28 Cr. L. J. 683 : A. I. R. 1927 O. 259 : 103 I. C. 411.

2. *Stoddart* (1909) 73, J. P. 348.

3. *Cohen and Bateman* (1909) 73 J. P. 352 : 2 Cr. A. R. 197.

4. *Abrath v. North Eastern Railway* (1883) 11 Q. B. D. 440, 453.

respect of civil cases in these words :—"It is no misdirection not to tell the Jury everything which might have been told them ; there is no misdirection unless the Judge has told them something wrong, or what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must show that something wrong was said or that something was said which would make wrong that which was left to be understood." This principle has been adopted by the Court of Criminal Appeal in respect of criminal trials.⁵ There may be cases in which the several omissions taken individually and by themselves may not be of much significance, but their cumulative effect may be considerable and so amount to misdirection ; as for instance, *R. v. Mc. Gill*⁶ where there were so many omissions that the Court of Criminal Appeal observed that what was said was worse than no summing up.

Misdirection therefore, includes not only error in laying down the law by which the Jury are to be guided, but also a defect in summing up the evidence, or in not summing it up or summing it up erroneously. Such error and defect are in all cases an infringement of the law as laid down in S. 297 Cr. P.C.⁷ Omission to place before the Jury matters which should have been placed before them is misdirection.⁸ Non-direction amounts to misdirection only when the non-direction is such that there are grounds for thinking that the Jury by reason of such non-direction were put on the wrong track.⁹ Non-direction on important matters of fact vitiates a verdict.¹⁰

WHAT A SUMMING UP SHOULD BE.—ITS GENERAL NATURE.

The subject of summing up is so intimately connected with the subject of the respective duties of the Judge and the Jury that it requires to be opened with a few prefatory remarks that legitimately appertain to the latter subject. These details are condensed in the maxim, '*Ad questionem facti non respondent Judices, ad questionem legis, non respondent juratores.*'—It is the office of the Judge to instruct the Jury on points of law, and of the Jury to decide on matters of fact. The discrimination between law and fact, therefore, is a very important part in Jury trials, and although it is not difficult to distinguish between law and fact in so far as they are complicated in the ultimate issue that arises for consideration in a criminal trial, a right distinction between the two is not always quite an easy matter. Thayer in his Preliminary Treatise on Evidence at the Common Law says,¹¹

"In tracing the long history of the Jury and the way in which it has come to be a body of Judges, we have remarked the necessity of separating law from fact and have seen how great a part this requirement has played in shaping our whole system. Sometimes the

5. Stoddart (1903) 73 J. P. 348, 352.

6. (1914) 10 Cr. A. R. 267.

7. Sundaresa Iyer 1930 M. W. N. 249 (F. B.).
See also Elahee Buksh (1866) 5 W. R. 80 (F. B.) ; Fattechand (1863) 5 B. H. C. R. 85.

8. Kellappa (1895) Rat., 806.

9. Bajit Mian (1927) 6 P. 817 : 29 Cr. L. J. 81 : A. I. R. 1928 P. 120 : 106 I. C. 673.

10. Dwarika Das (1928) 33 C. W. N. 84 : 30 Cr. L. J. 912 : A. I. R. 1929 C. 170 : 118 I. C. 351.

11. P. 183, Chap. V., headed *Law and fact in Jury trials.*

discrimination between law and fact in its relation to jury trials is identified, in legal discussions, with the distinction between what matter is for the Court and what for the Jury. When that happens, attention is drawn at once to an important hint, namely that the inquiry relates only to the issue,—to the law and fact which are complicated in the ultimate proposition in dispute. It is only with the issues that the juries have any necessary concern ; as regards everything else, no question need arise as to what is for the Jury and what for the Court. But beyond this suggestion we have got no real help, in attempting to fix the meaning of law and fact, from this identification. To be told that the law is for the Court and fact for the Jury, to hear again this familiar Latin that *ad questionem facti non respondent Judices, ad questionem juris non respondent juratores*, enlightens us not at all as to the true discrimination between fact and law".

However that may be, it is for the Jury and not the Judge to resolve and find what the fact is, while it is for the Judge to assist the Jury in arriving at a right conclusion as to the fact. The summing up of the Judge is meant for such assistance.

Sir James Fitz-James Stephen says,¹²—

"The summing up again is a highly characteristic part of the proceedings, but it is one on which I feel it difficult to write. I think however that a Judge who merely states to the Jury certain propositions of law and then reads over his notes does not discharge his duty. This course was commoner in former times than it is now. [It was followed, to take one instance in a thousand, by Lord Mansfield in *Lord George Gordon's Case*¹³]. I also think that a Judge who forms a decided opinion before he has heard the whole case or who allows himself to be in any degree actuated by an advocate's feelings in regulating the proceedings, altogether fails to discharge his duty, but I further think that he ought not to conceal his opinion from the Jury, nor do I see how it is possible for him to do so, if he arranges the evidence in the order in which it strikes his mind. The mere effort to see what is essential to a story, in what order the important events happened, and in what relation they stand to each other must, of necessity, point to a conclusion. The act of stating for the Jury the questions which they have to answer and of stating the evidence bearing on those questions and in showing in what respect it is important, generally goes a considerable way towards suggesting an answer to them, and if a Judge does not do as much at least as this, he does almost nothing. The Judge's position is thus one of great delicacy, and it is not I think too much to say that to discharge the duties which it involves as well as they are capable of being discharged, demands the strenuous use of uncommon faculties, both intellectual and moral. It is not easy to form and suggest to others an opinion founded upon the whole of the evidence without on the one hand shrinking from it, or on the other closing the mind to considerations which make against it. It is not easy to treat fairly arguments urged in an unwelcome or unskilful manner. It is not easy for a man to do his best and yet to avoid the temptation to choose that view of a subject which enables him to show off his special gifts. In short, it is not easy to be true and

12. History of the Criminal Law of England, i, pp. 455-6.

13. (1781) 21 How. St. Tr. 535.

just. That the problem is capable of an eminently satisfactory solution, there can, I think, be no doubt. Speaking only of those who are long since dead, it may be truly said that to hear them in their happy moments the summing up of Judges as Lord Campbell, Lord Chief Justice Earle or Baron Parke was like listening not only (to use Hobbe's famous expression) to law living and armed, "but to the voice of Justice itself".

It is obvious that in the matter of summing up a case to the Jury the responsibilities of a Judge are very onerous. These responsibilities, have to a large extent been lightened by the establishment of the Court of Criminal Appeal in England in 1907, which is able, by the powers it exercises, to remedy any injustice due to an improper summing up. The same factor has also been potent in bringing about a marked improvement in the summing up of Judges, by laying down, by its decisions, requisites of various descriptions. Under the English system, the position, such as it is, may shortly be summarized as follows :

The Jury, no doubt, are entitled to the assistance of the Judge on the facts.¹⁴ But the summing up is not so essential a part of a trial, where the facts are clear and the law simple that the Court of Criminal Appeal will necessarily quash a conviction where there has been no summing up ;¹⁵ though it may do so where the trial is such that the Jury should have the assistance of the presiding Judge in directing them and he has failed to give it.¹⁶ A Judge may in a simple case invite the Jury to say that they do not want a summing up ;¹⁷ or there may be cases in which the facts are so plain that the Jury may simply be asked what is their verdict, remembering that it is for the prosecution to prove their case.¹⁸

In India the duty of summing up is a statutory duty. The statutory provisions, such as they have been, are the following :

S. 379 of Act XXV of 1861 as amended by Act XXXIII of 1861 provided that :

"In a trial by Jury, the Judge shall sum up the evidence on both sides and the Jury shall then deliver their finding upon the charge. A statement of the Judge's direction to the Jury shall form part of the record. In trials not by Jury, the ground of the Judge's decision shall be recorded."

S. 255 of Act X of 1872 provided that :

"When the case for the defence and the prosecutor's reply, if any, are concluded, the Court shall proceed, * * in cases tried by Jury to charge the Jury, summing up the evidence for the prosecution and defence, and laying down the law by which the Jury are to be guided. A statement of the Judge's direction to the Jury shall form part of the record."

Act X of 1872 introduced two new Sections laying down the respective duties of the Judge and the Jury :

14. Finch (1916) 12 Cr. A. R. 77 ; Kurasch (1917) 13 Cr. A. R. 13.

15. Norman (1913) 9 Cr. A. R. 134.

16. Finch (1916) 12 Cr. A. R. 77 ; Kurasch (1917) 13 Cr. A. R. 13.

17. Newman (1913) 9 Cr. A. R. 134.

18. Mc. Gill (1914) 10 Cr. A. R. 267, 278.

S. 256.—“It shall be duty of the Judge—

To decide all questions of law and especially all questions as to the relevancy of facts which it is proposed to prove, the admissibility of evidence, of the proprieties of questions asked by parties or their agents which may arise in the cause of the trial ; and in his discretion prevent the production of inadmissible evidence, whether it is or is not objected to by the parties :

To decide upon the meaning and construction of all documents given in evidence at the trial ;

To decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given ;

To decide whether any questions which arise is for himself or for the Jury, and upon this point his decision shall be final.

The Judge may, if he thinks proper, in the course of his summing up, express to the Jury his opinion upon any question of fact or upon any question of mixed law and fact relevant to the proceeding.

Illustrations :

(a) It is proposed to prove a statement made by a person not called as a witness under circumstances which render evidence of his statement admissible.

It is for the Judge and not for the Jury to decide whether the existence of those circumstances has been proved.

(b) It is proposed to give secondary evidence of a document the original of which has been lost or destroyed.

It is the duty of the Judge to decide whether the original has been lost or destroyed.”

S. 257.—“It is the duty of the Jury :

(1) To decide which view of the facts is true and then to return the verdict under which such view ought, according to the direction of the Judge, to be returned ;

(2) To determine the meaning of all technical terms, and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;

(3) To declare all questions declared, by the Indian Penal Code or any other law, to be questions of fact ;

(4) To decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure, or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations :

(a) A is tried for the murder of B :

It is the duty of the Judge to explain to the Jury the distinction between murder and culpable homicide and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the Jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the jury."

In Act X of 1892, S. 255 of Act X of 1872 underwent a charge, the portion of the Section quoted above being divided into the two following parts :

S. 297—"In cases tried by jury, when the case for the defence and the prosecutor's reply (if any), are concluded, the Court shall proceed to charge the jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

And S. 367 (which dealt with the language and contents, etc. of judgment) * * * "Provided that in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury."

As regards Ss. 256 and 257 they retained their shape in Act X of 1882, Ss. 298 and 299, with only the following modifications :—Each of these Sections was prefaced with the words, "In such cases" ; S. 256 was numbered as S. 298 and was divided into two Sub-sections which were numbered (1) and (2), and Sub-sec. (1) was subdivided into four clauses, (a) to (d) ; and S. 257 was numbered as S. 299 and the clauses (1) to (4) thereof were now made clauses (a) to (d).

In Act V of 1898 as also in the subsequent amending Act, the above-mentioned provisions of Act X of 1882 were left untouched.

Juries in India, especially in the Mofussil, are more dependent upon the Judge than they are in England (where the Jury trial is based upon the Common Law, and not on statute as in India) for sound and proper advice and assistance as regards the degree of weight which may be fairly and safely attached to the testimony of particular witnesses.¹⁹ The Jury being untrained in the kind of work they have to do, the Judge has to assist them so that they may duly discharge their duty. Hence arises the necessity of a proper summing up. The Judge states the substance of the charge, divesting it of all technical phraseology that may encumber it, directs the attention of the jury to the precise issue they have to try and applies the evidence to that issue. Errors of omission, therefore, may be as important as errors of commission. The scope and object of the charge, therefore, is to enable the Judge to place before the Jury the facts and circumstances of the case, both for and against the prosecution, so as to help them in arriving at a right

19. See the observations of Sir Barnes Peacock, C.J. in *Elahee Buksh* (1866) 5 W.R. 80 (F.B.).

decision.²⁰ It is mandatory upon the Judge to charge the Jury, and in so doing, to sum up the evidence for the prosecution and the defence and to lay down the law. The object of requiring the Judge to sum up the evidence is that he may render such assistance as he can to the Jury by pointing out to them the salient evidence, both for the prosecution and for the defence. It is not necessary for him to read his notes of the evidence, though it may often be desirable to read his notes of the important parts of the evidence, nor is it necessary for him to go through the whole of the evidence. Where the Judge asked the Jury whether they desired him to read out his notes of any part of the evidence and on the Jury saying that they did not so desire, the learned Judge really did not deal at all with the evidence : *Held*, that the Judge is bound to sum up the evidence, whether or not the Jury desire him to do so, and that his failure to do so is an error of law which brings the case within Cl. 26 of the Letters Patent. Broomfield, J. observed :—"A proper summing up by the Judge is an essential part of the system of trial by Jury prescribed by the Code, and except where the facts are admitted, a proper summing up should include a summary of the case for the prosecution and the case for the defence, and some reference to the actual depositions of the witnesses with appropriate comment or criticism. Material discrepancies in the evidence should also be pointed out. The amount of detail necessary must obviously depend on the nature of the case. It has to be remembered that the Jury, who are the judges of fact, have usually no record of the evidence on which they are to pronounce. The Judge has his notes and also the depositions taken before the Magistrate. The Jury, as a rule, have nothing but their recollection of what the witnesses have stated. It is the Judge's duty, therefore to make sure that the essential facts deposed to, facts in issue and relevant facts, are fresh in the minds of the Jury before they retire to consider the verdict. If there has been a very full discussion of the evidence at the Bar, the Judge's work is lightened, but he is not relieved of his duty, nor is he relieved of it by the opinion of the Jury themselves which may be unduly optimistic that they are not in need of any reminder."²¹ The Code of Criminal Procedure does not contemplate the reception of a verdict from the Jury without their having the assistance of a summing up by a Judge ; since a careful summing up may alter or change the hasty or superficial impression of a Jury, the parties are entitled to this service.²² In one case under the Code of 1861, however, the High Court did not interfere with the verdict of the Jury, although there was no summing up of the evidence by the Judge at all, because it did not consider that the accused was prejudiced by the omission.²³ Where at the end of the prosecution evidence the Public Prosecutor waives his right to sum up the evidence, where he has such right, and the Jury then express an opinion that the evidence is incredible and the Judge agrees with them, it may not be necessary for the Judge to go through the formality of summing up the case to the Jury ; but this is certain that this cannot be done until the whole of the prosecution evidence has been duly recorded.²⁴

20. Khijiruddin (1925) 53 C. 372 : 42 C. L. J. 504 :
27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92
I. C. 442.

21. Puttam Hassan (1935) 38 Bom. L. R. 19 (F. B.) :

37 Cr. L. J. 365 : A. I. R. 1936 B. 52 : 160
I. C. 1060.

22. Abdul Karim (1886) Rat. 288.

23. Sitwa (1870) 14 W. R. 66.

24. Ramalingam (1896) 20 M. 445 : 2 Weir 384.

There should be but one charge both on the facts and on the law, and the Judge cannot divide the charge into two.²⁵ So, where a Sessions Judge required the Jury to give a finding on one or two questions of fact constituting the proof in the case, before he concluded his charge with reference to the other questions, of fact : *Held*, that the course adopted was irregular, if not illegal, and was calculated to embarrass the Jury in arriving at the character of the offence, if any, proved.²⁶ Also, where a Sessions Judge without summing up the entire case to the Jury and without charging them on all the issues involved, drew their attention to the evidence relating to the time of the occurrence, upon which the whole case depended, and asked them to return an intermediate verdict of not guilty : *Held*, that the procedure followed was highly irregular and the case should be retried.²⁷ According to S. 297 Cr. P. C. the Judge can only charge the Jury after all the evidence for both sides has been taken and Counsel on both sides have concluded their address to the Jury. A Sessions Judge adopted the following procedure, as described by him in his judgment :—"After the evidence for the prosecution was closed. I asked the Vakil for the defence to examine in the first instance certain witnesses who he stated would prove clear alibi for the 18th and the 19th accused, as these witnesses seemed to be the principal witnesses on whom he relied. There was a host of other witnesses cited by the defence and it seemed to me that the quickest way of getting through the case would be for the Vakils and myself to sum up the case generally and then against each of the accused, one by one, leaving it to the Jury to say if they wished to hear the witnesses for the defence cited by him or were prepared to find that the prosecution had not made out a case against him. This procedure was followed until the case for the 6th accused was reached. By this time it appeared that too much time was taken by speech, and as the Vakil who represented the accused then stated that he intended examining only a few of the witnesses cited he was asked to examine them at once in a batch. After all the witnesses were examined, the Vakils on both sides summed up once for all. I summed up first generally on the facts to recall the salient points in the case to the Jury; and after that with regard to the evidence for and against each accused person, starting from the 6th accused." *Held*, that the Judge's charge as regards accused Nos. 1 to 5 was clearly premature and that as regards these accused no 'Verdict' in the proper sense of the term was obtained.²⁸

2. Whether the Judge should express his own opinion on questions of fact to the Jury.

S. 297 Cr. P. C. says : "The Court shall proceed to charge the Jury. Summing up the evidence for the prosecution and defence, and laying down the law by which the Jury are to be guided." To proceed in order, therefore, we shall have to take up the topic of summing up of the evidence first and then of laying down the law. Now, in dealing with the question of the summing up of the evidence, the first question that strikes one is whether,

25. In re Anchula (1838) 2 Weir 493.

26. In re Badava (1896) 2 Weir 499.

27. Nasar Darzi (1928) 33 C. W. N. 451 : 30 Cr.

L. J. 434 : A. I. R. 1929 C. 62 : 115 I. C. 257.

28. Abdul Hameed (1912) 36 M. 585 : 15 Cr. L. J. 197 : 22 I. C. 981.

if at all and if so to what extent, is the Judge permitted to express his own view of the facts to the Jury. It will be seen that under the Code S. 298, in which the duty of the Judge is laid down, Sub-sec. (2) says,—“The Judge may, *if he thinks proper*, in the course of his summing up express to the Jury his opinion upon any question of fact or upon any question of mixed law and fact, relevant to the proceeding.” The Code thus, far from prohibiting the expression of opinion by the Judge on questions of fact, expressly sanctions it and enjoins on him the duty of doing so if he thinks proper. The performance of this duty is beset with difficulties of no mean magnitude.

The maxim, *‘Ad questionem facti non respondent iudices, ad questionem juris non respondent juratores*, forms the foundation of the idea that Judges should never communicate their opinion on questions of fact to the Jury ; but there is high authority for the view that the maxim was never true, if taken absolutely. Thayer says,²⁹—

“It (the maxim) was a favourite saying of Coke in discussing special verdicts ; and in *Isaack v. Clarke* (Rolle, i, p. 132 : 2 Bulst., p. 314 (1613-14)) he attributes it to Bracton ; but that appears to be an error ; a careful search for it in Bracton failed to discover it. It seems likely that this formula took shape in England in the sixteenth Century. But the maxim was never meant to be taken absolutely. As I said, it is limited to questions with which the jury has to do ; it relates only to issues of fact, and not to the incidental questions that sprang up before the parties are at issue, and before the trial ; and so many of those which present themselves during the trial. The maxim has nothing to do with matters of evidence, but only with a limited class of questions of fact ; namely, questions raised by the pleadings, questions of ultimate fact * * * It is true that Coke had a way of generalizing the matter and quoting the maxim as if it represented a limitation upon the Judges, as wide and full and exact as that upon the Jury * * * And accordingly he gets quoted in this country (America) for a doctrine that would have much amazed him or any other English Judge from the beginning down, namely for the notion that the Court, at Common Law, has no right to tell the jury its own view of the facts. [See, for example, the dissenting opinion of Daniel, J. in *Mitchell v. Harmony*, 13 Howard 115, 141-148]. The doctrine has widely found expression in the statutes of our States. In 1796 the North California Legislature amended the Common Law rule by prohibiting Judges from expressing an opinion on the facts. [Walter Clark in 4 Green Bag, 457, 472, who quotes the excellent adverse comments on this practice by Ruffin, J. in *State v. Moses*, 2 Dev. 452.] In Massachusetts, the change was introduced in 1860 (Gen. St. C 115, S. 5) in the form that the Courts shall not charge juries with regard to matters of fact but may state the testimony and the law. It is not too much to say of any period, in all English history, that it is impossible to conceive of trial by jury as existing there in a form which would withhold from the jury the assistance of the Court in dealing with the facts. Trial by jury in such a form as that is not trial by jury in any historic sense of the words. It is not the venerated institution which attracted the praise of Blackstone and of our

29. A preliminary Treatise on Evidence at Common Law, Pp. 185-189,

ancestors, but something novel, modern and much less to be respected. In the Federal Courts the Common Law doctrine on this subject has always held. "In the Courts of the United States as in those of England, from which our practice was derived, the Judge in submitting a case to the jury may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment on the evidence, call their attention to parts of it which he thinks important, and expresses his opinion on the facts * * * The power of the Courts of the United States in this respect is not controlled by the Statutes of the State forbidding Judges to express any opinion upon the facts". [Gray, J. for the Court in *Vicksburg etc. R. R. Co. v. Putnam*, 118 U. S. 545, 553 (1886). And so, *Mc Lanahan v. Ins. Co.*, 1 Pet 170, 182 (1828) and *Simmons v. U. S.* 142 U. S. 148, 155 (1891)]. In *U. S. v. Phil. and Reading R. R. Co.*, 123 U. S. 113, 114 (1887), the Court said : "Trial by jury in the United States is a trial presided over by a Judge, with authority, not only to rule upon objections to evidence and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it, to aid the jury by explaining and commenting upon the testimony and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination."

In England and in most of the States of America the presiding Judge proceeds to address the Jury, stating to them the questions, recapitulating the evidence and commenting on it in such a manner as he deems correct, for the purpose of enabling the Jury to understand it well and to apply the law properly to it. In these addresses he often freely expresses his opinion as to the weight of evidence, the sufficiency of the proofs, the force of probabilities and improbabilities and the comments of the Counsel. It is, however, always understood that the opinion of the Judge on questions of fact are not binding on the Jury and that the Jury have always a right to form their independent judgment on such questions. But naturally and generally speaking, the Judge's opinion on facts, unless he exhibits some impropriety or betrays some unjustifiable feeling, carry a great weight with the Jury because such opinion is given for their assistance. In this country the trend of authorities is in favor of the Judge being allowed to express his own view of the facts but not too definitely or dogmatically, but also that whenever he does express it he must couple it with a reminder to the Jury that they are not bound by it and are competent to disregard it if they so choose.

So far as the English Law is concerned, a few cases will illustrate the position. The facts must be left to the Jury to decide and the Judge must not usurp their function or take the decision out of their hands.³⁰ While a Judge is entitled to express his own view on the evidence he ought not to invite the Jury to accept it ; and any expression of his own view ought to be accompanied by a direction that the right of deciding on the facts is solely theirs.³¹ He should not put forward too positive expressions of his own belief.³² But he is entitled

30. West (1910) 4 Cr. A. R. 179 ; Baeby (1911) 6 Cr. A. R. 141 ; Frampton (1917) 12 Cr. A. R. 202.

31. Mason (1924) 18 Cr. A. R. 131.

32. Randles (1908) 1 Cr. A. R. 194 ; Hepworth (1910) 4 Cr. A. R. 128 ; Pralley (1910) 4 Cr. A. R. 161.

to express his opinion strongly in a proper case, provided he leaves the issues to the Jury.³³ In one case the Court of Criminal Appeal has observed,—“In our view a Judge is not only entitled but ought to give the Jury some assistance on questions of fact as well as on questions of law. Of course questions of fact are for the Jury * * Yet the Judge has experience on the bearing of evidence and in dealing with the relevancy of questions of fact * * It is not wrong for the Judge to give confident opinions on questions of fact. It is impossible for him to deal with doubtful points of fact unless he can state some of the facts confidently to the Jury. It is necessary for him sometimes to express extremely confident opinions. The mere finding, therefore, of very confident opinions in the summing up does not show that it is an improper one. * * * One must give credit to the Jury for intelligence and for their knowledge that they are not bound by the expressions of the Judge upon questions of fact.”³⁴

When the Jury system of trial was first introduced in the mofussil in this country, it was considered very unwise for Judges to express their own views of facts to the Jury. In one of the earliest case it was said,—“It is not desirable that Judges should give their opinions as to the guilt or innocence of a prisoner so unmistakeably as has been done in the present case. Native jurors are too often apt to take what they think to be the Judge’s opinion as their guide without paying any attention to the facts of a case, and we conceive that the Judge should go no further than a general commentary on the evidence and a statement of what is the legal offence proved, should such evidence be credited.”³⁵ In another case it was observed,—“Although I find nothing in the Judge’s charge that can be said to be a misdirection, I think it would be as well if he refrained for the future from expressing his opinion too decidedly. Native juries are in all cases apt to follow what they imagine to be the opinion of the presiding officer, and any expression of the Judge’s own sentiment should be avoided. The most I conceive that a charge should contain is a statement of the evidence *pro* and *con* with a running commentary as to its agreement or disagreement, with the other facts of the case.”³⁶ Also—“A Judge should leave the points mentioned by him to be settled by the Jury instead of disposing of them as, in his opinion, ‘absolutely certain’.”³⁷ Again,—“The Court think it necessary to remind you that it is your duty as Sessions Judge to expound the law and lay the evidence before the Jury in an intellegible form leaving them entirely to determine the facts which they consider to be proved.”³⁸ In another case,³⁹ however, in which the question was more specifically considered, it was observed,—“It was contended that the Judge’s direction was irregular in as much as it intimated broadly the Judge’s opinion of the prisoner’s guilt, whereas * * the Judge could lawfully do no more than recapitulate the evidence on both sides and say whether he thought the witnesses trustworthy. * * If he could do this, and if it be admitted that there was evidence to go to the Jury, it is clear that he could in that way virtually say whether the prisoner was guilty or innocent. In fact, however, the Code of Criminal Procedure does not prohibit the Judge, from giving the Jury

33. O’ Donnell (1917) 12 Cr. A. R. 219.

34. Cohen and Bateman (1909) 2 Cr. A. R. 197.

35. Bharut (1864) 1 W. R. 2.

36. Gunga Bishen (1864) 1 W. R. 25.

37. In re Shunker Singh 1 W. R. Cr. Lett. 10.

38. In re Gourie Sunkur 3 W. R. Cr. Lett. 4.

39. Abdool Juleel (1864) W. R. Gap No. 5.

his opinion, provided he shows them * * that the decision rested with them and that they could decide as they thought proper. Nor does it appear * * objectionable that the Judge should assist the Jury with his opinion. In the matter of sifting evidence and of weighing probabilities he has probably had more experience than they and I see no reason why they should not have the benefit of that experience. In the case before me I do not consider the Judge's view was expressed more strongly than the evidence warranted, * * And, in fact, it is clear that the Jury were not carried away by the Judge's opinion, as he strongly stated his opinion that the prisoner might be convicted on three counts, whereas they have convicted him on one only." So also in another case⁴⁰ it was said,—“No doubt the Sessions Judge permitted the Jury to see the view he himself took of the facts, and perhaps he put somewhat more prominently before them that portion of the evidence which formed the basis of his opinion than he did the remainder. But we have no cause to think that this summing up was in any way calculated to prejudice the prisoner as to affect the fairness of the trial by the Jury.”

There is nothing wrong in a Judge expressing his own opinion to the Jury ; on the contrary, if he has an opinion he ought to express it ; but he must tell the Jury that they are the sole judges of fact and that they need not accept or follow his opinion.⁴¹ A charge which succeeds in avoiding any expression of opinion must generally amount to a most colourless and unhelpful direction.⁴² It is desirable that the Judge should tell the Jury what view he has taken of the facts, in order to enable them to consider the facts properly and to arrive at their own decision on them.⁴³ In the summing up the Judge must make a clear distinction between pure law and the expression of his own opinion upon any question of fact or upon any question of mixed law and fact, which latter he is especially empowered to state to them, if he thinks proper.⁴⁴ While the Judge is entitled to state his own opinion to the Jury it is advisable that he should guard himself by indicating clearly that the opinion is his own and that the Jury are entitled to draw their independent conclusion upon the facts.⁴⁵ Though the Judge is not debarred from expressing his opinion on the evidence, he should not do it in such a way as to leave in the minds of the Jury an impression that it is a direction which they should follow ; and the opinion should not be expressed strongly or dogmatically.⁴⁶

40. Sheppard (1870) 13 W. R. 23.

41. Bepin (1884) 10 C. 970 ; Ali Fakir (1897) 25 C. 230 ; Panchu Dass (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427 ; Natabar (1908) 35 C. 531 : 12 C. W. N. 774 : 7 C. L. J. 599 : 8 Cr. L. J. 6 ; Rahamat Ali (1930) 4 C. W. N. 196 ; Sourendra (1905) 10 C. W. N. 153 : 3 Cr. L. J. 144 ; Ring (1929) 53 B. 479 : 31 Cr. L. J. 65 : A. I. R. 1929 B. 296 : 120 I. C. 340 ; Nagendra (1929) 57 C. 740 : 34 C. W. N. 164 : 31 Cr. L. J. 673 : A. I. R. 1929 C. 742 : 124 I. C. 492.

42. Nagendra (1929) 57 C. 740 : 34 C. W. N.

164 : 31 Cr. L. J. 673 : A. I. R. 1929 C. 742 : 124 I. C. 492.

43. Abdul Rezaak (1924) A. I. R. 1928 C. 269.

44. Nanhak Ahir (1934) 13 P. 529 : 35 Cr. L. J. 1104 : A. I. R. 1934 P. 309 : 150 I. C. 687.

45. Sourendra (1905) 10 C. W. N. 153 : 3 Cr. L. J. 144.

46. Naibulla (1926) 43 C. L. J. 488 : 27 Cr. L. J. 1038 : A. I. R. 1936 C. 996 : 96 I. C. 990 ; Sumera (1933) 1933 A. L. J. 1634 : 35 Cr. L. J. 688 : A. I. R. 1934 A. 326 : 148 I. C. 504.

An expression of opinion by the Judge on the facts without telling the Jury that they are at liberty to form their own opinion with regard thereto,⁴⁷ or without telling them that his opinion is not binding on them and they are the sole judges of fact,⁴⁸ or in such a way as to lead them to believe that it is not open to them to take any other view,⁴⁹ is a misdirection. The law allows the Judge to express his opinion on facts, provided he leaves the decision of the facts entirely to the Jury,⁵⁰ and it is his duty to do so in order to assist the Jury, provided he is careful to express it in such a way as not to interfere with the duties of the Jury to finally decide according to their own view of the facts.⁵¹ It is not within the province of the Judge to find the facts for the Jury and then make an attempt to persuade them to accept his conclusions as correct.⁵² It is highly wrong on the part of a Judge to take the decision of facts out of the hands of the Jury by saying or suggesting that they are already ascertained facts.⁵³ A summing up, in which the Judge goes on dictating his findings on questions of fact in such a way as to leave an impression in the mind of the Jury that when they retire to consider their verdict they must, in arriving at their conclusion, abide by and try to reconcile their verdict with the Judge's opinion on facts, is no summing up and invalidates the verdict.⁵⁴ The Judge should not express his opinion in terms too dogmatic and unqualified or state his own view on important matters of fact so positively as to leave the Jury no loop-hole for taking any other view ; he may express his own opinion, but at the same time he should be careful to add that it is for them to form their opinion on the evidence ; he must not make an appeal or exhortation to the Jury.⁵⁵

If personal opinion is expressed, the defect may be rectified by saying to the Jury that they are not bound by it. Though here and there in the charge to the Jury the Judge may be indiscreet enough to give emphasis to his personal opinion (as to the evidence of an approver and the weight to be attached to identification) yet if he has rectified the mistake by telling the Jury at the end of the charge that they are not bound to accept his opinion and that they had to consider all the evidence and to form their own opinion then there was no misdirection or non-direction to prejudice the accused in his defence on the merits.⁵⁶ If a Judge simply states the opinion, which the law allows him to state, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him

47. Panchu Dass (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

48. Natabar (1908) 35 C. 531 : 12 C. W. N. 774 : 7 C. L. J. 599 : 8 Ct. L. J. 6 ; Gajo Singh (1922) 1923 P. 109 : 24 Cr. L. J. 495 : A.I.R. 1923 P. 238 : 72 I. C. 959.

49. Sumera (1933) 1933 A. L. J. 1634 : 35 Cr.L.J. 688 : A. I. R. 1934 A 326 : 148 I. C. 504 ; Menga Budhia. (1895) Rat. 748.

50. Rahamat Ali (1900) 4 C. W. N. 196.

51. Fararuddin (1925) 42 C. L. J. 111 : 26 Cr.L.J. 1553 : A. I. R. 1926 C. 105 : 90 I. C. 433 ; Satdeo (1935) 37 Cr. L. J. 182 (O)

52. Khijiruddin (1925) 53 C. 372 : 42 C. L. J.

504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.

53. Ramgopal Dhur (1868) 10 W. R. 7.

54. Sumera (1933) 1933 A. L. J. 1634 : 35 Cr.L.J. 688 : A. I. R. 1934 A 326 : 148 I. C. 504.

55. Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249 [relying upon Ali Fakir (1897) 25 C. 230, Ofel Mollah (1913) 18 C. W. N. 180 : 15 Cr. L. J. 147 : 22 I. C. 723, Menga Budhia (1895) Rat. 748 ; and following Natabar (1908) 35 C. 531 : 12 C.W.N. 774 : 7 C.L.J. 599 : 8 Cr. L. J. 6.]

56. Hadi Husain (1934) 11 O.W.N. 211 35 Cr. L.J. 502 : A. I.R. 1934 O. 122 : 147 I.C. 911.

to add as safe-guard a remark that it is his own opinion and that the Jury are at perfect liberty to form their own.⁵⁷ Where a Judge distinctly cautioned the Jury that they are not bound to accept his opinion on questions of fact, which they were to decide independently of his opinion, the mere expression of opinion by the Judge at places on matters of evidence does not amount to misdirection in law; especially when the expression of opinion is not of such a character as to leave nothing to the Jury for their consideration so far as matters of evidence are concerned.⁵⁸ In a long charge to the Jury the Judge cannot be expected to pause always to assure the Jury that matters of fact are matters for them; and where the Judge has abundantly cautioned them that questions of fact are for them and that they are entitled to disregard what he says, the charge cannot be objected to simply because there are passages here and there in which he has expressed himself in an assertive or dogmatic fashion.⁵⁹ It is not sufficient to give the Jury the warning that they are not bound by his opinion, in the formal way at the beginning or end of the charge; but the warning must be given when he expresses his opinion.⁶⁰ But the question always is a question of substance and not of form; and so it has been held that it is not necessary for the Judge on every occasion on which he expressed his opinion on a point of fact to tell the Jury that they are sole judges on questions of fact; and that it is sufficient if he makes that statement quite clearly to the Jury at the end of the charge.⁶¹ When the evidence is such that there can be room for reasonable doubt, it is dangerous for the Judge to express himself strongly one way or the other.⁶² The effect of the charge should be to give due weight to all the outstanding facts; the Judge should not put the prosecution case too strongly and fail to put the defence case as strongly as it ought to be put.⁶³ The Judge must not dogmatically assert with regard to charges made by the defence that they cannot stand and that the Jury must not place any faith in them or make remarks of that description.⁶⁴ He should not make suggestions, for instance of bribery of prosecution witnesses, where they are without foundation.⁶⁵ The Crown may place the whole case in the strongest light before the Jury, but the Judge in his summing up is in a very different position and must not thrust his opinion on the jurors.⁶⁶ But where in an appeal by the Crown against an order of acquittal, much of the criticism directed against the

57. Des Raj (1928) 5 O. W. N. 497; 29 Cr. L. J. 721; A. I. R. 1928 O. 326; 110 I. C. 577.

58. Hossain Ali (1934) 59 C. L. J. 396; 35 Cr. L. J. 1487; A. I. R. 1934 C. 757; 152 I. C. 40; Eusuf Ali (1932) 34 Cr. L. J. 430; A. I. R. 1933 C. 190; 142 I. C. 653; Monohar (1930) 31 Cr. L. J. 1115; A. I. R. 1931 C. 430; 126 I. C. 775.

59. Panchu Shaikh (1930) 34 C. W. N. 1154; 32 Cr. L. J. 190; A. I. R. 1931 C. 178; 128 I. C. 811.

60. Kamiraddi (1933) 37 C. W. N. 1102; 35 Cr. L. J. 483; A. I. R. 1934 C. 77; 147 I. C. 832.

61. Sri Kishen (1935) 37 Cr. L. J. 173; A. I. R. 1935 A. 928; 159 I. C. 900.

62. Kamiraddi (1933) 37 C. W. N. 1102; 35 Cr. L. J. 483; A. I. R. 1934 C. 77; 147 I. C. 832.

63. Asraf Ali (1933) 37 C. W. N. 595; 34 Cr. L. J. 533; A. I. R. 1933 C. 426; 143 I. C. 173.

64. Kamiraddi (1933) 37 C. W. N. 1102; 35 Cr. L. J. 483; A. I. R. 1934 C. 77; 147 I. C. 832.

65. Kamiraddi (1933) 37 C. W. N. 1102; 35 Cr. L. J. 483; A. I. R. 1934 C. 77; 147 I. C. 832.

66. Purna (1931) 32 Cr. L. J. 1101; A. I. R. 1931 C. 533; 134 I. C. 71.

charge really amounted to this that in one particular or another the Judge might have presented the case to the Jury more strongly against the accused that he did, and here and there had omitted to refer to facts or inferences which would have more highly coloured the case for the prosecution : *Held*, that there was no sufficient ground for reversal of the verdict.⁶⁷ It is by no means improper for a Judge to have indicated in cautious language his experience on the Bench that an explanation offered by the accused is one which deserves the consideration of the Jury.⁶⁸ But it is not for the Judge to tell the Jury that any explanation which the accused may offer of any fact appearing in evidence against him is incredible, without any qualification that it is merely his own opinion and that the Jury are at liberty to draw their own conclusion.⁶⁹

The question whether a Judge has a right to express his opinion or not was seriously considered in a case⁷⁰ in the Oudh Chief Court by Sir Louis Stuart, the Chief Judge, an extract from whose judgment, which is very important, is given here :

"Fortunately there has been a very recent decision of the Judicial Committee upon this point, which I trust will be sufficient to serve as a guide in future cases. This decision will be found in *Channing Arnold v. Emperor*⁷¹, and the words are * * :—'A charge to the Jury must be read as a whole. If there are salient propositions of law in it, these will, of course, be the subject of separate analysis. But in a protracted narrative of fact, the determination of which is ultimately left to the Jury, it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceeding in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the Jury's province'. These words appear to me to lay down the main principles that have to be applied in such circumstances. The case must be fairly left within the Jury's province. If the Judge attempts to take the case out of the Jury's province by something in the nature of imposing his own view upon the Jury, it is a case of misdirection, but if a Judge simply states his opinion which the law allows him to do, in such a manner that intelligent jurymen should see for themselves that it is only his opinion and nothing else, it is not necessary for him to add as a safe-guard a remark that it is only his opinion and that the Jury are perfectly at liberty to form their own. It cannot and should not be presumed that jurymen are wanting in practical intelligence or possessed of no independence. If such a presumption were made, the Jury system would stand condemned. If the Jury are not wanting in ordinary intelligence and are not servile, it is clear to me that a Judge who expresses his opinion on a point of fact, as his own opinion, does not require to add the qualification that the Jury need not accept that opinion unless they wish, for it is obvious that if it is his opinion and the Jury are to decide on facts, they need not accept it unless they so desire. It is their duty to accept his opinion upon the questions of law. On questions of fact the Judge's opinion in no way binds the Jury, but the

67. *Purna* (1931) 32 Cr. L. J. 1101 : A. I. R. 1931 C. 533 : 134 I. C. 71.

68. *Ramdas* (1928) 8 P. 344 : 30 Cr. L. J. 721 : A. I. R. 1929 P. 313 : 117 I. C. 173.

69. *Lxumana* (1898) 2 Weir 385.

70. *Des Raj* (1928) 5 O. W. N. 497 : 29 Cr. L. J. 721 : A. I. R. 1928 O. 326 : 110 I. C. 577.

71. (1914) 41 I. A. 149 at pag: 168.

Judge has a right to express it so that the Jury know what it is. The principles underlying the rule by which a Judge in summing is permitted to give his opinion and the manner in which that opinion should be given were discussed more than sixty years ago by a leading jurist, Sir James Fitz-James Stephen : 'After the evidence is concluded, the Judge sums up. His position from first to last is that of a moderator between two litigants. He permits or forbids certain things to be done ; but he originates nothing. His summing up may, and generally does, indicate his opinion ; but it is an opinion which is the result of the evidence laid before him, and not of an independent enquiry'. It is necessary to add a modification to these words in the case of Judges in India who, being permitted to call witnesses independently in cases in which they think necessary, do occasionally originate. To all intents and purposes, however, the fact remains that the opinion of a Judge in summing up in India is almost invariably the opinion upon the evidence which has been laid before him. At another place of the book from which this quotation has been taken (*A General View of the Criminal Law of England*) the writer says in reference to charges to Juries in Criminal Cases :—'Facts submitted to a strong mind are naturally brought into their logical relation and made to indicate the conclusion which ought to be drawn from them. Impartiality and indecision are totally different things. A Judge summing up is an advocate who chooses his side impartially and gives the Jury as vigorous a statement as he can of the grounds on which his conclusions rest and of the view which he takes of the arguments against it. When this is well done it is of the greatest possible assistance to the Jury in the discharge of their duty. A strong-minded Judge and an intelligent Jury—Lord Mansfield and twelve London merchants—form together the best possible tribunal, but in order to show their merits, the Judge must do his best, and if he is merely to talk about and about a case, without indicating any conclusion or putting the facts together, he does more harm than good.' This is, of course, in no way authoritative, but it expresses the opinion of an eminent lawyer on a subject well within his knowledge. I have given these quotations because they contain largely my own conclusions. I should not go so far as to say myself that a Judge summing up is an advocate who chooses his side impartially, but I am strongly of opinion that it is not a Judge's duty to conceal his opinion but to state it."

Where there is no legal evidence against the accused, the Judge ought to charge the Jury for an acquittal and not leave the Jury to say whether the prisoner is guilty or not.⁷² A Jury may be satisfied with the minimum of proof and it is beyond the power of the High Court in such cases to interfere with their verdict ; but where there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all, as a verdict of guilty cannot, in such circumstances, be sustained.⁷³ On a charge of murder, if the Judge, with all his advantages, forms a strong opinion that the evidence is not sufficient for a conviction, it is dangerous to leave the matter to the Jury without a strong indication of the Judge's own opinion, so long as it is clear that in spite of that opinion they can, if they choose to, disregard it and bring in a verdict of guilty.⁷⁴

72. Greedhary (1867) 7 W. R. 39.

73. Rutton (1871) 16 W. R. 19.

74. Sali Sheikh (1931) 54 C. L. J. 241 : 33 Cr. L. J. 85 : A. I. R. 1931 C. 752 : 134 I. C. 1191.

INSTANCES OF POSITIVE EXPRESSION OF OPINION BY THE JUDGE.

Where a Sessions Judge told the Jury in a trial for dacoity that there was no force in the argument that the accused may not have foreseen and may not have intended that a dacoity should take place; *held*, that it was taking the decision of facts out of the hands of the Jury who alone were entitled to say what is the proper inference to be drawn from facts.⁷⁵ Where a Judge said,—“Several suggestions have been thrown out by the defence as regards the incredibility of F (a prosecution witness) but they are of the flimsiest character and as far as one can see are altogether baseless”; *held*, that it was a misdirection.⁷⁶ A Judge informed the Jury that it was for them to weigh the evidence with care and caution and that on questions of fact they are not bound by any opinion of his own; but he expressed his own opinion in terms too dogmatic and unqualified; *held*, that there was misdirection.⁷⁷ Where a Judge after discussing certain reasons given in a deed for its execution said,—“Hence the reasons given are false”; *held*, that the Judge should have left it to the Jury to form their own conclusion.⁷⁸ In a case in which the Judge repeatedly called up the Jury in the following terms,—“Do you believe this?” “Can you believe that?” instead of leaving them to judge of the evidence and to decide what weight should be attached to it; it was held that the style of the charge was very objectionable and that it was not a summing up which the law contemplates but a sustained effort at persuasion to take a particular view.⁷⁹ On a charge of rape the Judge in his charge to the Jury said;—“You will observe that the second intercourse was against the girl’s will and without her consent” etc., instead of saying as he ought to have, “You will have to determine upon the evidence in this case whether the intercourse was against the girl’s will,” etc.; and the charge went on in the same style of stating to the Jury what had been proved instead of leaving it to them to decide what, in their opinion, was proved. In the concluding sentence the Judge said,—“You have seen the witnesses and I have no doubt that you will return a just verdict”. *Held*, that there was misdirection, the concluding words notwithstanding.⁸⁰ The Judicial Commissioner commenced his charge to the Jury by telling them that “there is no doubt”, etc. The High Court observed,—“I have no hesitation in saying that every one of the facts which the Judicial Commissioner says “there is no doubt” about were solely within the province of the Jury to decide upon. They lay at the foundation of the charge which was made against the prisoner * * * It was for the Jury and not for the Judge to decide upon these matters; and, in my opinion, the Judge erred grievously when he took them out of the hands of the Jury and told them they were ascertained facts.”⁸¹ In a trial under S. 366 I. P. C. the Judge charged the Jury in the following words: “The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her

75. In re Shivappa (1909) 11 Cr. L. J. 334; 5 I. C. 935 (M).

76. Kali Sing (1907) 7 C. L. J. 246; 7 Cr. L. J. 315.

77. Ofel Mollah (1913) 18 C. W. N. 180; 15 Cr. L. J. 147; 22 I. C. 723.

78. Sadhu Sheikh (1900) 4 C. W. N. 576.

79. Raj Coomarr (1873) 19 W. R. 41; 10 B. L. R. App. 36.

80. Ali Fakir (1897) 25 C. 230 [following B pin (1884) 10 C. 970.]

81. Ramgopal (1869) 10 W. R. 7.

father's place the presumption is that he did so with intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the record". *Held*, that this amounted to a misdirection of the Jury. The question of intent was a pure question of fact, but the way in which it had been put to the Jury left them no option but to adopt the view taken by the Judge.⁸² It is right and proper that a Judge should, at the conclusion of the trial, whether or not such trial is held before a Jury, make up his mind as to whether the prosecution has or has not proved its case to the hilt. It is also permissible for a Judge and indeed (especially in India) it is often necessary for a Judge to express his opinion extremely clearly to the Jury. It is also permissible, though not always or indeed often advisable, to admonish the Jury as to their duty. But it is unfair to the Jury if the Judge says to them,—“I am thoroughly convinced of the guilt of the accused. Return a just verdict. If you do not, both you and I will be disgraced for ever”.⁸³ To state that the evidence of the eye-witnesses is singularly free from anything like serious discrepancies is hardly the correct way of putting the matter before the Jury; the Judge can only say that it is his opinion; he should inform the Jury that it is for them to decide for themselves what importance they will attach to that evidence.⁸⁴

But where the Judge told the Jury that the prisoners who were the only other adult males residing in the village were the only other persons on whom suspicion could fall: *Held*, that this was only the Judge's opinion, but it was only a natural suggestion to make to the Jury and it was one upon the Jury could exercise their own judgment.⁸⁵ When the Judge tells the Jury that the prosecution story is corroborated or supported by certain prosecution witnesses, he is only reminding the Jury of the facts that are recorded in the case and he does not mean that these witnesses should necessarily be believed; hence there is no misdirection.⁸⁶

3. What sort of Summing up is helpful to the Jury.—

In his summing up the Judge must make a clear distinction between pure law and the expression of his opinion upon any question of fact, or upon any question of mixed law and fact relevant to the proceeding which he is specially empowered to state to them, if he thinks proper.⁸⁷ To comply with the provision of the law the Judge in his charge to the Jury must lay down the law by which the Jury are to be guided and sum up the evidence.⁸⁸ In a case under the Code of 1861, where a prisoner was tried for participation in a crime with other prisoners who had been already tried and punished before the same Sessions Judge, the Judge did not give a new charge to the Jury trying the case but only read over

82. Hughes (1891) 14 A. 25.

83. Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249.

84. Arumuga (1933) 1933 M. W. N. 320.

85. Misser Sheikh (1870) 14 W. R. 9.

86. Lala (1933) 56 A. 210 : 35 Cr. L. J. 668 : A. I. R. 1933 A. 941 : 148 I. C. 339.

87. Nanhak Ahir (1934) 13 P. 529 : 35 Cr. L. J. 1104 : A. I. R. 1934 P. 309 : 150 I. C. 687.

88. Ramprosad (1924) 26 Cr. L. J. 1090 : A. I. R. 1926 N. 53 : 88 I. C. 178.

to them his charge to the former Jury. This procedure was condemned, but no fresh trial was ordered as the sentence of the prisoner had already expired.⁸⁹ On questions of law the directions of the Judge must be decisive. In a case where a prisoner was charged, 1st. with abetting of culpable homicide not amounting to murder; and 2nd. of voluntarily causing grievous hurt; and the Judge directed the Jury that if they believed the evidence they should find the prisoner guilty of one or other of the offences; Hobhouse, J. said—"Upon the evidence I could have wished that the Judge had summed up more decisively."⁹⁰ The Judge must point out the important evidence in the case, emphasize the points for and against the accused, point out the discrepancies and even express his own opinion, provided he cautions the Jury that they are not bound by it and they alone are the Judges of facts; if there is no legal evidence, he is bound to say so to the Jury and ask them to acquit the accused.⁹¹ To charge the Jury at very great length may itself be an obstacle to them in arriving at a correct decision; the Jury are lay men and to enable them to arrive at a correct decision it is necessary that the essentials should be clearly brought out and not overwhelmed or obscured by a mass of detail.⁹² The Judge should follow some system or sequence. He may adopt any sequence, though a chronological order is preferable; he should not go forward with a story, then break off and then retrace his steps, as such a charge is difficult to understand for a Jury.⁹³ Where the charge to the Jury was little more than a rambling statement of the evidence as it came from the mouths of the several witnesses who were called and no attempt was made to sift the relevant and important matters from the irrelevant and unimportant facts, *held* that the charge was defective and the trial was vitiated on that account.⁹⁴ It is not sufficient for the Judge simply to point out this piece of evidence and that, this presumption and that, this bit of law and that. It is his duty to help and guide the Jury to a proper conclusion. It is his duty to direct the attention of the Jury to the essential facts. It is his duty to point out to them the weight to be attached to the evidence and to impress upon them that if there is any doubt in their minds they must give the benefit of the doubt to the accused. It is not enough that the Judge has said something on each of these matters somewhere in the charge. It is the manner of saying it, the arrangement and the structure of his charge which will make it either of value or valueless to the Jury.⁹⁵ It is essential to take the greatest possible care to avoid mistakes being made.⁹⁶ An accused cannot be said to have had a fair trial if the Judge in his direction to the Jury was not only adverse to him, but also omitted to obtain the decision of the Jury on a material point and his charge also contained a mis-statement of facts

89. Mahadeo (1864) W. R. Gap. No. 15.

90. Doorgessur (1867) 7 W. R. 61.

91. Bansidhar (1934) 1934 A. L. J. 1160 : 36 Cr. L. J. 322 : A. I. R. 1934 A. 1032 : 153 I. C. 364 ; Greedhary (1867) 7 W. R. 39 ; Rutton (1871) 16 W. R. 19.

92. Ardali Mian (1933) 35 Cr. L. J. 56 : A. I. R. 1933 P. 496 : 146 I. C. 460.

93. Kamiraddi (1933) 37 C. W. N. 1102 : 35 Cr. L. J. 483 : A. I. R. 1934 C. 77 : 147 I. C. 832.

94. Javed Sikdar (1931) 35 C. W. N. 835 : 53 C. L. J. 351 : 32 Cr. L. J. 1138 : 134 I. C. 317.

95. Molla Khan (1933) 37 C. W. N. 1061 (S. B.) : 35 Cr. L. J. 601 : A. I. R. 1934 C. 169 : 148 I. C. 172.

96. *Ibid.*

prejudicial to the accused.⁹⁷ Even though the charge may technically comply with the requirement of the law contained in S. 297 of the Code, yet if the explanation of the law is drastically meagre and the summing up of the evidence is the barest possible skeleton of the evidence on the record, and important points which should have been brought to the notice of the Jury were not so brought; *held* that a retrial should be ordered.⁹⁸

It is absolutely his duty to give a narrative and history of the case,⁹⁹ and to place the facts and evidence in a clear manner before the Jury so as to enable them to grasp the details and come to a right decision.¹⁰⁰ The charge should set forth the evidence for the prosecution and for the defence and the points which arise for consideration in a manner calculated to help the Jury.¹⁰¹ It is not enough to read out the evidence *in extenso*; it is incumbent on the Judge to analyse it and place it succinctly before the Jury.¹⁰² The Judge should give substantial help and guidance to the Jury by properly marshalling the facts, setting out the evidence and expressing his own opinion about the estimate of that evidence, but he should always be careful to tell the Jury that the decision on questions of fact is within their province and that decision is to be arrived at by them untrammelled by the opinion expressed by the Judge as to the credibility or otherwise of a particular piece of evidence.¹⁰³ The proper mode for the Judge to adopt is to present to the Jury as clearly and impartially as he can a summary of the evidence and the considerations and inferences to be drawn from the evidence as they bear on the negative and affirmative sides of each of the issues. It is impossible, of course, for any Judge to draw the attention of the Jury to every fact which has been deposed to, but he can, without difficulty, give them a summary of the leading points of the evidence, and the considerations and inferences to be drawn from it on the one side and on the other.¹⁰⁴ The Judge need not, in every particular and in every detail, address himself to every suggestion put forward by the defence. His duty is fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence respectively.¹⁰⁵ Where a summing up points to the Jury the principal features of the evidence as regards the case for the Crown and the defence of the prisoner it complies with the requirements of the Code; mere omission to mention some statements in the evidence or some circumstances connected with the evidence which might presumably have weight with the Jury is not misdirection sufficient to vitiate a verdict.¹⁰⁶ It is necessary to sift and weigh and value the evidence; though the final weigh-

97. *Nehru Mal* (1927) 2 Luck. 597 : 28 Cr. L. J. 683 : A. I. R. 1927 O. 259 : 103 I. C. 411.

98. *Dwarika Das* (1928) 33 C. W. N. 84 : 30 Cr. L. J. 912 : A. I. R. 1929 C. 170 : 118 I. C. 351.

99. *Panchu* (1905) 1 C. L. J. 385 : 2 Cr. L. J. 311.

100. *Mira Gajbar* (1903) 6 Bom. L. R. 31 : 1 Cr. L. J. 1.

101. *Palavesa Tevan* (1911) 1 M. W. N. 190 : 12 Cr. L. J. 140 : 9 I. C. 788.

102. *Rajab Ali* (1927) 31 C. W. N. 881 : 46 C. L. J. 31 : 28 Cr. L. J. 742 : A. I. R. 1927 C. 631 : 103 I. C. 790.

103. *Sumera* (1933) 1933 A. L. J. 1634 : 35 Cr. L. J. 688 : A. I. R. 1934 A. 326 : 148 I. C. 504.

104. *Raj Coomar* (1873) 19 W. R. 41 : 10 B. L. R. App. 36.

105. *Eknath* (1916) 1 P. L. J. 317 : 17 Cr. L. J. 353 : 35 I. C. 657.

106. *Sheppard* (1870) 13 W. R. 23.

ment is for the Jury the Judge ought to see that all essential facts go into the scales of justice and on the proper side of the balance ; further, facts must be marshalled by the Judge under separate heads and in distinct compartments as they affect each separate incident in the story, and the law should be stated in short and simple form.¹⁰⁷ The Judge is required to sum up the evidence on both sides, and in doing this it is his duty to state to the Jury what are the principal points in the evidence and how they bear for and against the prisoner.¹⁰⁸ Where the Judge, owing to strong bias, omitted to charge the Jury properly and there was no connected narrative in the charge nor any sufficient attempt to marshal and sift the evidence against each of the accused or to direct the Jury about its relevance or value or what offences it disclosed : *held*, that the trial was vitiated.¹⁰⁹ It is not expected, because it is impossible, that the Judge should refer to every fact in his charge to the Jury.¹¹⁰ But where it appeared that in his charge to the Jury the Judge, on certain salient points, put the prosecution case too strongly and failed to put the defence case as strongly as it should have been, *held* that the charge was defective and that the conviction should be set aside.¹¹¹ It was said of a charge,—“Every point is taken against the prisoner and many points in his favor are omitted. It is true that some points in his favor are alluded to by the Judge, but he alludes to them for the purpose of immediately neutralizing their effect by placing his own views on them before the Jury. One of the points in favor of the accused, and that is a material point, is very curiously alluded to in the charge * * * is not placed as prominently as it should have been before the Jury.”¹¹² A charge which does not put the various matters for the Jury fairly but leaves broad hints that the case for the defence on certain matters requires little consideration is defective.¹¹³ The aim of a Jury trial is not a psychological examination of the mentalities of the jurymen ; it is concerned with the definite proof of a distinct offence ; and the use of language tending to divert the attention of the Jury from the main issue to a subsidiary point should be deprecated.¹¹⁴ S. 297 Cr. P. C. does not mean that a Judge should give merely a summary of the evidence ; he must marshal the evidence so as to bring out the lights and the shades and the probabilities and the improbabilities, so as to give proper assistance to the Jury who are required to decide which view of the facts is true.¹¹⁵ It is the duty of the Judge to analyse, to sift and to weigh the evidence, to marshal the facts properly, to discover and arrange in some sort of order before the Jury the facts which are really material and upon which they should concentrate their attention. In dealing with each individual prisoner he must take the evidence against each

107. Nagendra (1929) 57 C. 740 : 34 C. W. N. 164 : 31 Cr. L. J. 673 : A. I. R. 1929 C. 742 : 124 I. C. 492.

108. Bolakee (1866) 6 W. R. 72.

109. Ram Sumer (1933) 38 C. W. N. 77 : 35 Cr. L. J. 1313 : A. I. R. 1934 C. 273 : 151 I. C. 409.

110. Tafiz Pramanik (1929) 50 C. L. J. 584 : 31 Cr. L. J. 916 : A. I. R. 1930 C. 228 : 125 I. C. 743.

111. Asraf Ali (1933) 37 C. W. N. 595 : 34 Cr. L. J.

533 : A. I. R. 1933 C. 426 : 143 I. C. 173.

112. In the matter of Chinibash (1878) 1 C. L. R. 436.

113. Isu Sheikh (1926) 31 C. W. N. 171 : 45 C. L. J. 584 : 28 Cr. L. J. 201 : A. I. R. 1927 C. 200 : 99 I. C. 937.

114. Sachchidanand (1933) 14 P. L. T. 580 : 34 Cr. L. J. 892 : A. I. R. 1933 P. 488 : 144 I. C. 936.

115. Ilu (1934) 62 C. 337 : 36 Cr. L. J. 358 : A. I. R. 1934 C. 847 : 153 I. C. 454.

one, summarize it and point out clearly to the Jury how each prisoner is affected by the evidence which has been given. He must point out the kind of weight which ought to be given to this, that or the other set of facts, in order to show to the Jury some light and shade in the submission of facts to them. The duty of a Judge in these respects is all the more important in a lengthy trial; a mere resume of the evidence is not sufficient.¹¹⁶ A charge to the Jury ought to be delivered extemporaneously immediately after the final speeches of the lawyers engaged in the trial or of the evidence in the absence of such speeches. Obviously, it ought not to be written out beforehand *in extenso* and equally obviously it is not humanly possible, except perhaps in isolated and very exceptional cases, to write it out afterwards *in extenso* from memory. A direction about reasonable doubt should appear at the end of the charge or in its appropriate place in the body of the charge; to conclude this head with an academic disquisition on the subject of proof is not only useless and a waste of time, but will certainly have the effect of filling the minds of the Jury with confusion. To hang a lot of witnesses' numbers round the neck of each accused without any discussion of the evidence given by the witnesses is not the way in which to carry out the instructions of the High Court that the case of each accused must be dealt with separately.¹¹⁷ To take the witnesses one by one in the order of their examination and to place their disconnected statements before the Jury is not in general very helpful; more assistance will be derived by the Jury from a careful collation of the evidence as it bears upon the several allegations of the respective parties.¹¹⁸ The charge should shortly state the salient points in the case and should not be delivered in such a way as to have the effect of confusing the Jury as to the way in which the law should be applied to the case.¹¹⁹ The Judge should be careful to see that he does not usurp the functions of an advocate and his charge should be dispassionate and impartial: This criticism was made against a charge in which the Judge said,—“There is no doubt about the complicity of T (the accused) in the matter;” “as to T's presence at the occurrence there cannot possibly be any doubt”; “his refusal to disclose the names of the offenders shows that he was not an honest or disinterested person wholly unconnected with the affair”; “the fact that A was returning from the *haut* at dusk would not in the least detract from the truth of the prosecution story as to his participation in the crime” etc. etc.¹²⁰ A charge to the Jury which is entirely one-sided and calculated to suggest to the Jury that there is practically no doubt as to the main facts and that there is no use considering the matter from any point of view other than that presented by the prosecution offends against the most elementary rules to be observed in cases of summing up of the evidence to the Jury.¹²¹ A

116. Akbar Seikh (1930) 35 C. W. N. 404 : 33 Cr. L. J. 486 : A. I. R. 1932 C. 395 : 137 I. C. 682.

117. Asanulla (1935) 62 C. 911 : 39 C. W. N. 924 : 36 Cr. L. J. 1246 : A. I. R. 1935 C. 534 : 157 I. C. 837.

118. Abdul Rahim (1921) 25 C. W. N. 623 : 33 C. L. J. 340 : 22 Cr. L. J. 606 : 62 I. C. 878.

119. Jabanullah (1929) 57 C. 1162 : 34 C. W. N. 365 : 32 Cr. L. J. 111 : A. I. R. 1930 C. 434 : 128 I. C. 254.

120. Taribullah (1921) 25 C. W. N. 682 : 23 Cr. L. J. 244 : 66 I. C. 180. *See also* in the matter of Chinibash (1878) 1 C. L. R. 436.

121. Rajab Ali (1927) 31 C. W. N. 881 : 46 C. L. J. 31 : 28 Cr. L. J. 742 : A. I. R. 1927 C. 631 : 103 I. C. 790.

charge which takes the form of a considered argument tending in favour of the prosecution rather than an impartial summing up of the evidence to the Jury is entirely illegal.¹²² When the directions as to the probabilities have the effect of putting the probabilities in favour of the prosecution too strongly before the Jury and upon a mere assumption of facts which the Jury are not asked to find for themselves, it amounts to misdirection which vitiates the trial.¹²³ The charge should include the usual warning as to the duty of the Jury to the prosecution on the one hand and to the prisoner on the other. The High Court observed in a case¹²⁴ :—"We have no desire in this connection to lay down any precise rule as to the form a charge should take. The form and contents of the charge will vary, of course, with the circumstances of each particular case, with the nature of the evidence the Judge has to deal with and the mode in which the case for the prosecution and the case for the defence are conducted. Generally speaking, however, it is usual to begin a charge by setting out the offence or offences with which the prisoner is charged with having committed and explaining the law relating to those offences. Then the case for the prosecution and the case for the defence may be referred to and such comments made on the evidence adduced on either side as the Sessions Judge may think it desirable or useful to the Jury to make." The summing up contemplated by the law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it, as sound judicial discretion would suggest. The Judge must formulate and specify simple issues for the consideration of the Jury and collate the evidence *pro* and *con* bearing upon the issues in order to assist the Jury to arrive at a correct decision thereon. Merely summarizing the evidence, examination-in-chief, cross-examination and re-examination of the different witnesses who have deposed at the trial and putting before the Jury all that has been said by the witnesses or by the lawyers appearing on two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the Jury, only confuses them and does not comply with the object which the law has in view.¹²⁵

In discharging his duties of fairly and candidly pointing out the main and salient features of the case from the point of view of the prosecution and of the defence respectively, the Judge is entitled to take into consideration the speeches made upon both sides, by the Crown and the prisoner's Counsel, in considering his presentation of the evidence to the Jury.¹²⁶ In England it has been held that the Judge need not go through the evidence in the summing up, especially where Counsel has dealt with it and the case is plain.¹²⁷ A Sessions Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the Jury by the advocates on both sides ; but he should not, in doing so, omit pointedly to call the attention of the Jury to matters of prime importance,

122. Tajali Mian (1927) 7 P. 50 : 28 Cr. L. J. 843 : A. I. R. 1928 P. 31 : 104 I. C. 459.

123. Chhakari Shaik (1924) 26 Cr. L. J. 567 : A.I.R. 1926 C 439 : 85 I. C. 711.

124. Afruddi (1919) 23 C. W. N. 833 : 29 C.L.J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485.

125. Jessarar (1925) 29 C. W. N. 526 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

126. Eknath (1916) 1 P. L. J. 317 : 17 Cr. L. J. 353 : 35 I. C. 657.

127. Mc Dougall (1912) 7 Cr. A. R. 130.

especially if they favour the accused, merely because they have been discussed by the advocates.¹²⁸ Where rival contentions have been put before the Jury with elaboration and skill by the advocates on both sides, the Judge may shorten his summing up, but he cannot omit reference to matters of prime importance especially if they favor the accused, merely because they have been discussed by the advocates.¹²⁹ While in such cases he need not make his charge so elaborate, still in a case in which the accused is unrepresented, it is particularly necessary that the Judge in his charge should bring to their notice the arguments which would have been used if he had been represented by a pleader.¹³⁰ The observations which a Judge should make to a Jury upon the facts must be determined by circumstances which must vary according to the intelligence of the Jury, also according as the case has or has not been fully discussed by Counsel, etc.; the summing up should be looked at as a whole.¹³¹ Mere reference to the arguments of the pleaders is insufficient; and the more essential items of discrepancies and contradictions and the important arguments (in that case such arguments for the defence had not been sufficiently referred to) should be referred to.¹³² The ability of Counsel for the defence does not relieve the Judge of his task, which the law imposes on him, of fairly and fully charging the Jury; at the same time it is reasonable that the Judge should take into account the elaboration and skill of the Counsel.¹³³ The fact that the defence Counsel addressed the Jury for a long time would not excuse the Judge from referring to matters of prime importance in his charge to the Jury, in as much as the Jury should learn from him what are the important points to which their attention should be directed.¹³⁴ The Sessions Judge commenced his summing up saying,—“As the trial had protracted over 4 days and as they had heard very long arguments on both sides he would not go into the details of the evidence.” And the summing up was meagre and only a part of the evidence was referred to. The High Court observed :—“But we think the reasons given should have induced him to lay before the Jury clearly, though concisely, the evidence as affecting each of the accused severally; not only what told against them but any that might be in their favour.”¹³⁵

The Judge in addressing the Jury should endeavour to speak in a simple and direct manner; the charge to the Jury should not be involved and the language used should not be extravagant, so that the Jury may not experience any difficulty in appreciating its true intention and meaning.¹³⁶ It is far better to use the plainest and simplest language, and if he does express his own opinion on the facts he should do it in such a way as to make it quite clear

128. Malgowda (1902) 27 B. 644 : 4 Bom. L. R. 683.

129. Waman (1903) 27 B. 626 : 5 Bom. L. R. 599 ;
Mangan Das (1902) 29 C. 379 : 6 C. W. N. 292.

130. Mahomed Khan (1930) 32 Cr. L. J. 172 :
A. I. R. 1930 S. 308 : 128 I. C. 673.

131. Mangal Singh (1931) 8 O. W. N. 344 : 32
Cr. L. J. 858 : A.I.R. 1931 O. 171 : 132 I.C.
232.

132. Hari Charan (1921) 34 C. L. J. 512 : 23
Cr. L. J. 342 : 66 I. C. 998.

133. Ram Bhagwan (1918) 19 Cr. L. J. 886 : 47
I. C. 82 (P).

134. Peary (1919) 23 C. W. N. 426 (F. B.) : 20
Cr. L. J. 300 : 50 I. C. 348.

135. Jugut Mohini (1881) 10 C. L. R. 4.

136. Horendra (1910) 11 Cr. L. J. 538 : 7 I. C. 915
(C).

to the jurors that he is not in any way seeking to usurp their functions or to interfere in matters the decision of which is exclusively within the competency of the Jury itself.¹³⁷ He should avoid, as far as may be, the use of expressions which assume the guilt of the accused and must not indulge in strong or colloquial expressions.¹³⁸ Where a charge is delivered in words which the Jury might misinterpret and thereby be induced to come to the conclusion that there was no more to be said about the matter, it amounts to a misdirection.¹³⁹ Where a summing up is calculated to leave a misleading impression¹⁴⁰ or to confuse,¹⁴¹ the verdict cannot be sustained. Where a Judge in his charge to the Jury attacked in veiled language with double meaning the character of the complainant so as to disparage him, and there was no connected narrative in his charge nor any sufficient attempt to marshal and sift the evidence against each accused nor to direct the Jury about its relevance and value or what offence was disclosed ; *held*, that there was misdirection.¹⁴²

The Judge is not bound to suggest to the Jury that they can acquit unless the facts so require it.¹⁴³ It cannot be said as a matter of law that the Judge must always tell the Jury that it is open to them to find a lesser offence ;¹⁴⁴ he should not direct them to find a lesser offence as that would be taking the case away from the Jury.¹⁴⁵

Counsel ought to correct obvious mistakes in the summing up.¹⁴⁶ Interruption to summing up is not permitted except to correct a clear mis-statement.¹⁴⁷ Counsel ought to remain present during the Judge's summing up. Judge Parry, in commenting on the Maybrick Case has observed :¹⁴⁸ "It has always seemed to me a pity that on the first day of the summing up Sir Charles Russel (Prisoner's Counsel) was absent the whole day, engaged in the Civil Court in an important Railway Case. It may be said that he could have done nothing to help his client, but it offends my sense of the theatre that an advocate should leave the stage when his presence, though he has merely a listening part, must have such a strong effect on the human audience in the Jury box". It is the duty of the Judge to assist the Jury so long as the Jury are deliberating on the verdict.¹⁴⁹ Counsel for the prosecution should not be allowed to appeal to religious or racial prejudices.¹⁵⁰ Counsel defending in a capital case should be restrained from referring to the probable consequences of a verdict of guilty.¹⁵¹

137. Monohar (1930) 31 Cr. L. J. 1115 : A. I. R. 1930 C 430 : 126 I. C. 775.

138. Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213 : 27 C. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321.

139. Durga Charan (1922) 26 C. W. N. 1002 : 36 C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922 C. 124 : 68 I. C. 407.

140. Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249.

141. Ejon Karikar (1920) 21 Cr. L. J. 829 : 58 I. C. 829 (C)

142. Ram Sumer (1933) 38 C. W. N. 77 : 35 Cr. L. J. 1313 : A. I. R. 1934 C. 273 : 151 I. C. 409,

143. Lyons (1910) 5 Cr. A. R. 99.

144. Naylor (1910) 5 Cr. A. R. 21.

145. West (1910) 4 Cr. A. R. 179.

146. Kams (1910) 4 Cr. A. R. 8 ; Butler (1910) 4 Cr. A. R. 146 ; Mowbray (1912) 8 Cr. A. R. 9.

147. Preston (1691) 1 Salk. 278 ; Hunt (1820). 3 B. & Ald. 572. See Roscoe's Criminal Evidence, 15th Edn ; PP. 293, 294 and 304.

148. Judge Parry's Dreams of the Law.

149. Fanshaw v. Knowles (1916) 2 K. B. 533 C. A. ; Banbury v. Bank of Montreal (1917) 1 K. B. 409. C. A.

150. House (1921) 16 Cr. A. R. 49 ; Coleman (1921) 16 Cr. A. R. 73.

151. Frampton (1928) 21 Cr. A. R. 17,

Address by Counsel after summing up is not permitted. Holt C. J. observed,—¹⁵² "It is contrary to the course of all proceedings in such cases to have anything said to the Jury after the Court has summed up the evidence. * * It is not the course to reply upon the Court". In that case the prisoner who was undefended was allowed as a favor to address the Court and not the Jury at this stage.

As regards the summing up of the evidence the matter will now be dealt with under the following topics. The division is by no means intended to be logical or scientific from any point of view ; besides, the subject has already been dealt with in some of its aspects under the previous headings,—*'Whether the Judge should express his own opinion on questions of fact to the Jury,'* and *'What sort of summing up is helpful to the Jury.'* The topics are :

4. How the evidence is to be dealt with,—Generally.
5. Directions as regards discrepancies.
6. Directions as to quantum of proof.
7. Directions on circumstantial evidence.
8. Directions on questions of identification of the accused.
9. Directions in cases where there are several accused persons.

4. How the evidence is to be dealt with,—Generally.

In looking at what is said to a Jury one should remember that Judges are not required to lay down abstract doctrines to juries, but to give directions how to deal with evidence *in the individual case*. A resume of the evidence is not sufficient ; the evidence should be collated in such a way as to enable the Jury to weigh the evidence intelligently and to estimate the value of each part of it in reference to the rest. Where there is conflicting evidence on any material point the special attention of the Jury should be called to it in order that they may consider which view of the facts is the true one.¹⁵³

A summing up in which the Judge treats the evidence as a series of unconnected facts without pointing out to the Jury the mutual relation, the sequence, the coherence of the several facts which constitute the part of that which makes up the proof, is not sufficient, even though he properly directed the attention of the Jury on the points on which they ought to be satisfied before they could find the charge proved against the accused.¹⁵⁴ To take the witnesses one by one in the order of their examination, to place their disconnected statements before the Jury is not in general very helpful ; more assistance will be derived by the Jury from a careful collation of the evidence as it bears on the several allegations of the respective parties.¹⁵⁵ Merely reading out the evidence is not sufficient, and it is incumbent on the Judge to analyze it and present to the Jury the points in favor of the

152. Preston (1691) 1 Salk. 278.

153. Sugalgadu (1898) 2 Weir 500.

154. Shahabut (1870) 13 W. R. 42,

155. Abdul Rahim (1921) 25 C. W. N. 623 : 33 C. L. J. 340 ; 22 Cr. L. J. 606 ; 62 I. C. 878,

accused.¹⁵⁶ Failure to direct the attention of the Jury to the salient points in the evidence on both sides amounts to misdirection. The Judge must sum up the case intelligently and it is his duty to point out any flagrant contradiction which has been suggested. No duty is cast upon him of recapitulating the arguments, but he must remind the Jury of the main lines of attack and defence adopted by Counsel.¹⁵⁷ The Judge must draw the attention of the Jury sufficiently to the defence raised, and sift and analyze the evidence with proper direction upon the value or the weight which ought to be or might be attached to it. It will not do if he simply details the evidence chronologically.¹⁵⁸ The Judge must group the witnesses in such a way as to direct the attention of the Jury to the evidence without confusing their minds.¹⁵⁹ He should collect all the evidence on the several allegations of the respective parties and not merely read the evidence of each of the witnesses in the order of their examination.¹⁶⁰ One of the earliest instructions issued to Judges by the Calcutta High Court was :—"Your charges should clearly and distinctly point out to the Jury what part of the evidence of any witness, if credited by them, bears on the guilt of the accused, thus enabling them to view as a connected whole, what, in the absence of a good summing up, may seem to them only an unconnected series of statements."¹⁶¹ Every particle of the evidence should be carefully scrutinized and compared or contrasted and substantial help and guidance should be given to the Jury to avoid any possibility of miscarriage of justice; the perfect Code is but a dull and lifeless treatise, without the enlivening and enlightening spirit with which it must be quickened by those human agents whose duty it is to practise and expound it.¹⁶² It is necessary for the Judge to sift and weigh and value the evidence; though the final weight is for the Jury, the Judge ought to see that all essential facts go into the scales of justice and on the proper side of the balance; further, facts must be marshalled by the Judge under separate heads and distinct compartments as they affect each separate incident in the story; and the law should be stated in a short and simple form.¹⁶³ Where the Judge, in commenting upon certain evidence, does not tell the Jury how far it could apply to the facts of the case, it amounts to misdirection.¹⁶⁴ The Judge, in his charge, discussed the evidence generally, describing it as very poor evidence which, standing alone, amounted to nothing: *held*, that the charge was defective and that he ought to have summed up the evidence to the Jury, calling their attention to the material parts of it and leaving them to form their own opinion on it, instead of treating it generally.¹⁶⁵ In an

156. Rajab Ali (1927) 31 C. W. N. 881 : 46 C. L. J. 31 : 28 Cr. L. J. 742 : A. I. R. 1927 C. 631 : 103 I. C. 790.

157. Dhiraji (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.

158. Natabar (1929) 34 C. W. N. 223 : 50 C. L. J. 476 : 31 Cr. L. J. 572 : A. I. R. 1930 C. 136 : 123 I. C. 751.

159. Hachuni Khan (1930) 34 C. W. N. 390 : 32 Cr. L. J. 33 : A. I. R. 1930 C. 481 : 127 I. C. 767.

160. Abdul Rahim (1921) 25 C. W. N. 623 : 33

C. L. J. 340 : 22 Cr. L. J. 606 : 62 I. C. 878.

161. In re Jumimah Bysnubee (1866) 5 W. R. Cr. Lett. 6.

162. Nagendra (1929) 57 C. 740 : 34 C. W. N. 164 : 31 Cr. L. J. 673 : A. I. R. 1929 C. 742 : 124 I. C. 492.

163. Nagendra (1929) 57 C. 740 : 34 C. W. N. 164 : 31 Cr. L. J. 673 : A. I. R. 1929 C. 742 : 124 I. C. 492.

164. Santiram (1930) 58 C. 96 : 32 Cr. L. J. 10 : A. I. R. 1930 C. 370 : 127 I. C. 657.

165. Gangia (1898) 23 B. 316.

early decision¹⁶⁶ the charge to the Jury in a case under Ss 467 and 114 I. P. C., was criticized in these words :—"The above details are, however, not to be gathered from the Judge's charge, which we regret to say is altogether inadequate to the ends of justice in a case which presents several complications and difficulties. We have been compelled to collect the facts from the evidence and we are quite certain that the Jury have not had that evidence analyzed and presented to them in proper shape, or in one calculated to make them feel how each detail or statement of fact bears upon the guilt or innocence of the accused. The Judge says in the commencement of his charge,—'The case has already occupied so much of your time (two entire days) and the evidence has been so fully commented on by Vakils for both sides that I shall only trouble you with some very brief remarks.' The above charge might possibly meet the requirements of a very simple case which turned on a mere question of identity or on the evidence as to one specific or distinct act, but it is wholly unsuited to the necessities of an important and difficult case in which moreover it is quite clear that there has been a good deal of party feeling and local excitement. The Judge's charge, we regret to say, evidences great ignorance of what a Judge's charge should be, how facts should be analyzed and arranged for the consideration of jurymen, and how the Jury ought to be told what inference they may fairly draw from facts if they credit the same." In a case of arsenic poisoning, the Judge omitted in his charge to the Jury to refer to some statements of one of the two boys (to whom the poison was given) before the Committing Magistrate and before the Sessions Judge and did not warn the Jury that before drawing inferences against the accused they must first be satisfied that he knew of the presence of arsenic in the sugar and that the evidence negatived the possibility of accident or mistake and that before using the chemical examiner's report they must be satisfied on the evidence that the substances examined were in fact what they were said to be, and, in discussing the question of accused's absence from his village, did not warn the Jury that even if they believed that he absconded, absconding is not necessarily or invariably incompatible with innocence. *Held*, that the charge to the Jury was vitiated by misdirection.¹⁶⁷ The Judge had summed up the evidence in this way :—"There are witnesses for the prosecution who positively affirm that the accused himself brought the articles charged for and caused the false bills to be prepared, and there are others who declare as positively that the blacksmith brought the articles and dictated the price to the writer of the bill. It will be for you, therefore, to decide which side speaks the truth, it being merely my duty to tell you that I do not see any reason for Z to make a false accusation against the accused and support it by false evidence. If you believe his statement and that of S, N and others whom he mentions, your duty will be to find the accused guilty ; but if you are not thoroughly persuaded of his guilt you must acquit him." The High Court observed¹⁶⁸ ;—"I need not say that this is no summing up at all. It gives no aid to the Jury either in the way of an arrangement of facts which are spoken to by the witnesses or by directing their attention to the points of law which it was necessary for them to

166. Jehan Bukish (1866) 5 W. R. 68.

168. Ramgopal (1868) 10 W. R. 7.

167. Ofel Mollah (1913) 18 C. W. N. 180 : 15 Cr.

L. J. 147 : 22 I. C. 723,

bear in mind in order to judge between the prisoner and the Crown upon the issue which was before them, and, as I have already said, it states that the man whose testimony was imperatively deserving of the most careful scrutiny and consideration on account of the suspicious part that the witness admitted that he took in the transaction was such as the jurors might implicitly depend upon." Where in a case of dacoity a witness is examined on behalf of the prosecution with regard to whom the case for the prosecution is that he was probably himself concerned in the dacoity, the Jury must be directed to consider the evidence of the witness with the greatest scrutiny.¹⁶⁹ Omission to draw the attention of the Jury to matters affecting the trustworthiness of witnesses is misdirection.¹⁷⁰ If the Judge omits to call the attention of the Jury to the fact of the original witnesses having been abandoned by the prosecution, of two of them having given evidence for the defence and of the witnesses examined in Court by the prosecution being entirely new witnesses, it is a misdirection.¹⁷¹ A Judge's omission to draw the attention of the Jury to the failure to put in an inquest report when that was material for the case and his omission to mention the existence of enmity between the accused and the prosecution witnesses, when there is clear evidence to support it, are misdirections which vitiate the conviction.¹⁷² Where a Judge omitted to tell the Jury that an alleged eye-witness to a forged bond had, on first seeing the bond, said that it was his signature and said that he had signed on trust, and in cross-examination denied the signature as his, and the Judge omitted to draw the attention of the Jury to the first statement and, on the other hand, told the Jury that the witness had denied his signature; it was held that it was a serious misdirection sufficient to vitiate the verdict. In the same case, two witnesses whose names appeared as having been signed for them denied having authorized anybody to sign their names and that in fact they were witnesses; it was said that the Judge should have told the Jury that although they must take that fact into consideration it did not necessarily follow that the appellant had anything to do with the attaching of the signatures.¹⁷³ Where the Assistant Surgeon who had examined the accused persons said that the injuries on them *might have been* self-inflicted and the Civil Surgeon also expressed the same opinion, and the Sessions Judge represented that in the opinion of the Assistant Surgeon the injuries *were* self-inflicted and also told the Jury that in the Civil Surgeon's opinion the wounds *could be* self-inflicted, but also said that this was an opinion which militated against the evidence for the defence: *held* that it was a misrepresentation of the evidence and so a misdirection.¹⁷⁴ The omission to call the attention of the Jury to the fact that 4 out of the 7 accused persons had not been mentioned by the prosecutor until 18 days had passed over was held to be a vital misdirection.¹⁷⁵ Where the Judge failed to point out to the Jury the effect of their finding that the document alleged to have been forged was not created when the prosecu-

169. Satya Charan (1924) 52 C. 223 : 26 Cr. L. J. 1155 : A. I. R. 1925 C 666 : 88 I. C. 515.

170. In re Muthaya Thevan (1926) 28 Cr. L.J. 307 : A. I. R. 1927 M 475 : 100 I. C. 531.

171. Dasarath (1907) 34 C. 325 : 5 Cr. L. J. 424.

172. In re Sennimalai Goundan (1915) 16 Cr. L. J. 717 : 30 I. C. 1005 (M).

173. Abdul Gafur (1920) 21 Cr. L. J. 670 : 57 I. C. 830 (C).

174. Natabar (1908) 35 C. 531 : 12 C. W. N. 774 : 7 C. L. J. 599 : 8 Cr. L. J. 6.

175. Leiu Tu (1884) 11 C. 10.

tion alleged it had been created, the charge was held to be defective and it was also held that the verdict could not be supported.¹⁷⁶ Where the medical evidence showed that the wound in the neck of the deceased was directed downwards and inwards from the left to the right side of the neck and it was proved that the accused was very much shorter than the deceased; *held*, that the Judge should have drawn the attention of the Jury to that fact and asked them to determine whether it was possible for the accused to have raised his hands to a sufficient height to strike downwards at the deceased's neck.¹⁷⁷ Lacuna in the prosecution case should be brought to the notice of the Jury; where the Judge omitted to draw the attention of the Jury to the fact that the prosecution had not made out where the poison had been obtained (in a case of arsenic poisoning), it was held that the omission amounted to a misdirection.¹⁷⁸

It is not incumbent on a Judge to read the whole of the depositions of the witnesses to the Jury.¹⁷⁹ It is his duty to put before the Jury the weak as well as the strong points of the prosecution case, and the verdict of the Jury is liable to be set aside where the Judge omits to put to the Jury the many defects in the prosecution case or fails to put them adequately.¹⁸⁰ It is not the business of a Judge charging the Jury to assume the part of the Counsel; his duty is to place the evidence before the Jury as he finds it; and although the inference left to be drawn about a particular piece of evidence is that it would be unsafe to accept the evidence, it is open to the Jury to believe that evidence and accept it if they choose to do so.¹⁸¹ It is enough if the Judge has emphasized all the important and essential features of the case and has drawn the attention of the Jury to the important evidence and has not overlooked any piece of evidence which would have weighed heavily against the prosecution.¹⁸² He has no duty to discuss in detail each and every item of the evidence; any such discussion leads to a great risk of the Judge's placing his own view of the facts too positively.¹⁸³ But in a case of importance, such as murder, where powerful arguments have been advanced and urged upon the attention of the Jury in favor of opposite views of the question, it is of utmost importance that the summing up of the Judge should be accurate, that it is his duty to have directed the Jury as to the legal weight which ought to be attached to the evidence as well as to correctly state what it was.¹⁸⁴ If the necessary points in the case are more or less dealt with in the Judge's charge, the mere fact that some of them were not amplified, as they might have been, does not amount to misdirection.¹⁸⁵ The Judge is not bound to do more than lay carefully and plainly before the Jury the evidence as recorded by him noting discrep-

176. Samiruddin (1934) 35 Cr. L. J. 1216 : A. I. R. 1934 C 622 : 150 I. C. 1122.

177. Asfar Sheikh (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 81 C. 52.

178. Jahura Bibi (1930) 35 C. W. N. 169 : 52 C. L. J. 417 : 32 Cr. L. J. 418 : A. I. R. 1931 C. 11 : 129 I. C. 677.

179. Fanindra (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 1 I. C. 970.

180. Doraiswamy (1929) 1929 M. W. N. 946.

181. Samiuddin (1928) 32 C. W. N. 616 : 29 Cr. L. J. 497 : A. I. R. 1928 C. 500 : 109 I. C. 225.

182. Aziz Khan (1934) 36 Cr. L. J. 612 : A. I. R. 1935 A. 103 : 154 I. C. 1019.

183. Narayan Singh (1928) 31 Cr. L. J. 557 : A. I. R. 1929 N. 295 : 123 I. C. 477.

184. Nawab Jan (1867) 8 W. R. 19.

185. Waman (1903) 27 B. 626 : 5 Bom. L. R. 599.

ancies and inconsistencies and pointing out generally the way in which it is favourable or unfavourable to the accused.¹⁸⁶ There is nothing that makes it incumbent upon any Judge to read the whole of the depositions to the Jury ; it is enough that references had been made to them so as to sufficiently draw their attention to them. On the other hand, it is not enough merely to read out the evidence *in extenso* ; it is incumbent on the Judge to analyse the evidence and place the case succinctly before the Jury.¹⁸⁷ In an old case, however, it was laid down that in capital cases and in all cases of a serious nature the Judge ought to read over the evidence, *in extenso* to the Jury, of the principal witnesses, if not of all the witnesses ; but if Counsel has referred to the points in his address which are in favour of the prisoner and there has been no prejudice to the prisoner or failure of justice, the omission is immaterial.¹⁸⁸ It is only necessary to direct the attention of the Jury to the important and salient points in the case ; moreover, if a prisoner is defended in the trial it may be taken that points in favour of the prisoner which were not alluded to in the Judge's summing up were made much of by the prisoner's Counsel and so it is not to be assumed that such points were absent from the minds of the Jury.¹⁸⁹ Weakness of the evidence and possibility of the deed having been committed by other parties should be pointed out : but omission to do so, not being positive misdirection, is not always a good ground for setting aside a verdict.¹⁹⁰ When the main points in the evidence have been placed before the Jury the fact that one or two minor details have not been placed before them will not amount to misdirection.¹⁹¹ Where a certain matter which might have been brought in along with others bearing on the same point was not brought to the notice of the Jury, such omission cannot be relied upon as a misdirection sufficient to vitiate the trial.¹⁹² When a summing up points out to the Jury the principal feature of the evidence as regards both the case for the Crown and the defence of the prisoner, it complies with the requisitions of the Code ; and if any certain matters are omitted the case is not one of positive misdirection. In such a case Phear. J. observed,—¹⁹³

“Doubtless it may be said with truth that the Judge omits to mention some statements in the evidence, some circumstances connected with the witnesses which might presumably have weight with the Jury. But we do not think that these omissions are such as to constitute an error of proceeding or to vitiate the trial. Unless the Judge in summing up is intended by law to repeat to the Jury *verbatim* the evidence of all the witnesses, obviously there must be some omission of the kind, which I have mentioned, in the Judge's charge to the Jury. We think that the Judge is not called upon by the Criminal Procedure Code to repeat to the Jury every word of every witness. He must use an intelligent discretion as to how he ought to put the substance of the evidence before the Jury ; and we think that this Court, on appeal, ought not to interfere with the result of the trial below unless it sees that the Judge has manifestly put

186. Chunder Kumar (1876) 25 W. R. 54.

187. Fanindra (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 1 I. C. 970 ; Rajab Ali (1927) 31 C. W. N. 881 : 46 C. L. J. 31 : 28 Cr. L. J. 742 : A. I. R. 1927 C. 631 : 103 I. C. 790.

188. Fattechand (1868) 5 Bom. H. C. R. 85.

189. Rochia Mohato (1881) 7 C. 42 : 8 C.L.R. 273.

190. Choonee (1866) 5 W. R. 13.

191. Fajar Ali (1933) 57 C. L. J. 583 : 35 Cr. L. J. 536 : A. I. R. 1934 C. 142 : 147 I. C. 1043.

192. Purna Chandra (1931) 32 Cr. L. J. 1101 : A. I. R. 1931 C. 533 : 134 I. C. 71.

193. Sheppard (1870) 13 W. R. 23.

the evidence before the Jury in such a way as likely to mislead them. We must assume that the Jury are themselves able to appreciate the value and force of the evidence which has been produced before them at the trial, and of which the law intends them to be the sole judges as regards the facts. And we think we ought not to hold that the omission on the part of the Judge to recall to their minds every portion of that which they must be assumed to have heard necessarily vitiates the whole trial".

The advice to the Jury to ignore the evidence of certain witnesses for the prosecution is not a proper direction ; his duty is to place the entire evidence for and against the accused before the Jury and leave the ultimate decision of questions of fact to them.¹⁹⁴ It is the duty of the Judge to place the evidence before the Jury as he finds it.¹⁹⁵ An Assistant Sessions Judge in his charge said that there was a mass of evidence for the prosecution and another mass for the defence and then told them,—“It may literally be said that the Jury may neglect it all”. The High Court observed,—“This, we think, is certainly a misdirection to the Jury. It is not the duty of the Judge to say that they may neglect any portion of the evidence. That is clearly against the provision of the law which says that the Jury are to give their verdict upon the whole of the evidence recorded.”¹⁹⁶ In the same case¹⁹⁷ the High Court also said,—“All that he (i.e., the Judge could properly state was how the evidence stood, whether in his opinion it was credible, pointing out at the same time the points which specially told in favor of the defence. Instead of that his direction practically amounts to a direction that the Jury are bound to reject most of the evidence. The Judge then goes on to say that the Jury can weigh the evidence, but that their attention should be concentrated upon the documents put in, upon which, he says, all turns and which, he says, are sufficient to decide the case. This again amounts to asking the Jury to decide the case upon a portion of the evidence and reject the rest ; and not to apply their minds to it as a whole”.

It is not for the Judge to start new theories not suggested at the bar and to put them before the Jury.¹⁹⁸ The duty of a Judge in charging a Jury is to present the facts in their natural aspect and not to suggest far-fetched explanations of points that tell in favor of or against either party ; such suggestions may properly be urged by the pleaders, and the Jury will then give them their due weight ; whereas if put forward by the Judge, a value will be attached to them to which they are not intrinsically entitled.¹⁹⁹ The Judge has no right to make suggestions of a kind (i.e., hints of bribe to the Police) which are without any foundation upon the record ; nor can the evidence which goes in favor of the accused be discounted merely on the arguments of the Public Prosecutor which are not based upon any evidence on the record.²⁰⁰ A charge in which the Judge places matters not borne out by the record

194. Naibulla (1926) 43 C. L. J. 488 : 27 Cr. L. J. 1038 : A. I. R. 1926 C. 996 : 96 I. C. 990.

195. Samiuddin (1928) 32 C. W. N. 616 : 29 Cr. L. J. 497 : A. I. R. 1928 C. 500 : 109 I. C. 225.

196. Mira Gajbar (1903) 6 Bom. L. R. 31 : 1 Cr. L. J. 1.

197. Ibid.

198. Bansi Dhar (1934) 1934 A. L. J. 1160 : 36 Cr. L. J. 322 : A. I. R. 1934 A. 1032 : 153 I. C. 364.

199. In re Kizhakedath (1899) 9 M. L. J. 387 : 2 Weir 386.

200. Kamiraddi (1933) 37 C. W. N. 1102 : 35 Cr. L. J. 483 : A. I. R. 1934 C. 77 : 147 I. C. 832.

before the Jury, finds facts for himself, and puts contested matters before the Jury in a manner prejudicial to the accused, will amount to defective summing up.²⁰¹ Statements in a charge to the Jury, when not borne out by the record, vitiates the charge.²⁰² In placing a suggestion made by the Crown Prosecutor without any evidence to support it, the Judge ought to point out to the Jury that there is no evidence to support the suggestion.²⁰³

The Jury cannot be required to make the presumption against an accused person that particular statements of a particular witness are true ; still less can they be required to make such a presumption as regards the prosecution witnesses as a body or the prosecution evidence as a whole. The Jury should be told that it is their duty to consider carefully and to say whether they are convinced by the prosecution evidence and that, if they are not convinced, there is no law which obliges them to convict. It is a serious error to tell a Jury in any form of words, that the law in a criminal case requires them *prima facie* to accept the particular statements of a witness and that it is only when the defence has shown good reasons to reject his statements that the Jury have any option in the matter.²⁰⁴ The Judge may warn the Jury against rejecting the testimony of witnesses for no reason whatever, but the less that is heard of legal presumption in favour of veracity the better. While weighing the evidence of a witness, the Judge said : "You will remember that there is a presumption of law that a witness who comes to Court and deposes on oath should be believed until there is good reason to disbelieve him" : *Held*, that there was a misdirection, though that was not sufficient for ordering a retrial.²⁰⁵ The Judge said :—"As there is a presumption of innocence in favour of the accused, so there is a presumption of truthfulness in favour of the witnesses. The presumption is rebutted if it is shown that the witness had told an untruth. But that would not justify you in rejecting his evidence in toto. You have to carefully scrutinise his evidence and should accept it only to the extent to which it is supported by the evidence of other trustworthy witnesses and circumstances and probabilities." *Held*, that the charge is objectionable.²⁰⁶ There is no rule of law that if a Jury thinks that a witness has been discredited on one point, they may not give credit to him on another ; the rule of law is that it is for the Jury to say whether they will or will not believe any particular piece of evidence.²⁰⁷ But when the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses have committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner there-under. If this principle is not

201. *Isy Sheikh* (1926) 31 C. W. N. 171 : 45 C. L. J. 584 : 28 Cr. L. J. 201 : A. I. R. 1927 C. 200 : 99 I. C. 937 ; *Ramgopal* (1863) 10 W. R. 57.

202. *Taribullah* (1921) 25 C. W. N. 682 : 23 Cr. L. J. 244 : 66 I. C. 180.

203. *Kali Sing* (1907) 7 C. L. J. 246 : 7 Cr. L. J. 315.

204. *Tazem Ali* (1930) 58 C. 1095 (S.B.) : 33 Cr. L. J. 196 : A. I. R. 1931 C. 796 : 135 I. C. 727.

205. *Saroj Kumar* (1932) 59 C. 1361 : 55 C. L. J.

439 : 33 Cr. L. J. 854 : A. I. R. 1932 C. 474 : 139 I. C. 873. *See also Tazem Ali* (1930) 58 C. 1095 (S. B.) : 33 Cr. L. J. 196 : A. I. R. 1931 C. 796 : 135 I. C. 727.

206. *Ambar Ali* (1928) 33 C. W. N. 55 : 48 C. L. J. 473 : 30 Cr. L. J. 825 : A. I. R. 1928 C. 769 : 117 I. C. 684.

207. *Profulla* (1931) 58 C. 1404 (F. B.) : 35 C. W. N. 731 : 53 C. L. J. 427 : 32 Cr. L. J. 768 : A. I. R. 1931 C. 401 : 131 I. C. 575.

explained to the Jury there is a possibility of a miscarriage of justice ; but if such caution is given and the Jury convicts notwithstanding it, the High Court cannot interfere even though in its view there has been a miscarriage of justice on such ground.²⁰⁸ In India, as conditions prevail at present, it is impossible to act up to the principle that the evidence of a perjured witness is of no value whatever and that it amounts to nothing and neither could be multiplied nor corroborated. The principle, if carried to its logical end, would bring the administration of justice in this country to a stand still ; for although it is seldom that the witness admits having perjured himself, it cannot be said of more than five or ten per cent of the witnesses that are daily examined in Courts that they have spoken nothing but the truth ; and unless Courts are allowed to use their judgments in sifting truth from falsehood, it will be impossible for them to administer justice.²⁰⁹

Where a Sessions Judge directed that a certain witness should be wholly disbelieved on the ground that in the lower Court he did not give the same version as that in his Court, the direction being in favour of the prisoner, is proper. His omission to tell the Jury that it was open to them to believe his evidence in the Committing Court does not amount to misdirection.²¹⁰ Where the Judge charged the Jury for the acquittal of one of several accused on the ground that the witnesses had deposed falsely as against him : *Held*, that he ought to have also made it clear to them that if they disbelieved the witnesses, on whose testimony the case hinged, in regard to any one of the accused, that was a circumstance to be carefully weighed by them in estimating the credibility of the testimony as it affected the other accused, and that his omission to do so and directing the Jury in language capable of being understood in a contrary sense amounted to misdirection.²¹¹ In cases arising out of sexual matters, the Judge must emphasize sufficiently the danger of convicting a man upon the uncorroborated testimony of a girl. He must make the Jury understand that only in exceptional cases will they be justified in accepting the uncorroborated testimony. He must not also misdirect himself on the question of corroboration. The corroboration required must be independent evidence, evidence of some witnesses other than the girl herself.²¹² In a case of rape it is the duty of the Judge to warn the Jury not to accept the evidence of the girl raped unless they find that it is corroborated in some material particulars implicating the accused. He should also tell them that if in spite of his warning they come to the conclusion that they believe the girl and think the accused guilty then they have the right to convict him on her uncorroborated evidence. In such cases, before a Jury are justified in accepting the testimony of the complainant they should be satisfied that she is a witness of truth, and if they find that she is a person of bad and loose character they will be reluctant to accept her evidence.²¹³ If a witness tells anything which appears untrue, it is still open to

208. *Jaspath* (1886) 14 C. 164.

209. *Ram Lal* (1934) 11 O. W. N. 1269 : 36 Cr. L. J. 86 : A. I. R. 1934 O. 507 : 152 I. C. 331.

210. *Tafiz Pramanick* (1929) 50 C. L. J. 584 : 31 Cr. L. J. 916 : A. I. R. 1930 C. 228 : 125 I. C. 743,

211. *Boga* (1899) 2 Weir 501.

212. *Nur Ahmed* (1933) 62 C. 527 : 38 C. W. N. 108 : 36 Cr. L. J. 796 : A. I. R. 1934 C. 7 : 155 I. C. 584.

213. *Surendra* (1933) 38 C. W. N. 52 : 35 Cr. L. J. 508 : A. I. R. 1933 C. 833 : 147 I. C. 999,

the Jury to believe any other statement made by that witness ; but that is a matter entirely within their own discretion and there is no hard and fast rule making other statements, which are not proved to be false, binding on the Jury.²¹⁴

There is no rule of law that it is illegal to convict a man on the evidence of only one witness.²¹⁵ If a material part of the prosecution story should be disbelieved, the Jury should seriously consider whether they should be believed at all and they should be warned to that effect.²¹⁶

The Judge is entitled to make independent suggestions on the evidence, not made by the prosecution or the defence.²¹⁷ But there may be cases where it would be better if he did not add to the suggestions of the Crown or the defence.²¹⁸ It is a misdirection to tell the Jury that unless they came to the conclusion that all the witnesses for the prosecution had come to Court to commit perjury and out of spite to the prisoner, they must find the prisoner guilty, when there is other possible explanation.²¹⁹ It is a misdirection to say that affirmative evidence is stronger than negative evidence.²²⁰ Where the evidence is open to two explanations that should be made clear to the Jury.²²¹

It is not the duty of the Judge to put to the Jury hypothetical cases, unsupported by any evidence.²²² It is not for the Judge to propose new theories, which have never been suggested at the bar, and to put them before the Jury, which would have no other effect than that of confusing them ; of course, when he is satisfied that there is no legal evidence against the accused, he is bound to say so to the Jury and also to tell them that they should acquit the accused.²²³ In a charge to the Jury it is not the duty of the Judge to go out of his way to explain a hypothesis for which there is no foundation either in the evidence or in the arguments before the Court.²²⁴ When the Judge asks the Jury to consider a suggestion made by him of an alternative case, he should leave it open to the Jury to accept it or not ; where he does so, it cannot be held that if the suggestion is not accepted the prosecution case must fail, and the making of such a suggestion does not amount to a misdirection.²²⁵ But where there is some evidence, it is for the Jury to say how far that evidence is to be believed and it is not correct to say that the matter could be left to the Jury only if the evidence relating to it is satisfactory, trustworthy and conclusive ; it is

214. Sagiruddin (1927) 30 Cr. L. J. 120 : A. I. R. 1928 C. 551 : 113 I. C. 280.

215. In re Veerappa Goundan (1928) 51 M. 956 (F.B.) : 30 Cr. L. J. 317 : A. I. R. 1928 M. 1186 : 114 I. C. 353.

216. Meher Sheikh (1931) 59 C. 8 : 35 C. W. N. 945 : 32 Cr. L. J. 892 : A. I. R. 1931 C. 414 : 132 I. C. 254.

217. Ryder (1913) 9 Cr. A. R. 100 ; Bantley (1913) 9 Cr. A. R. 109.

218. Smith (1915) 11 Cr. A. R. 229.

219. Taylor (1914) 11 Cr. A. R. 49,

220. House (1921) 16 Cr. A. R. 49 ; Coleman (1921) 16 Cr. A. R. 73.

221. Vassileva (1911) 6 Cr. A. R. 231.

222. Ajar Shaikh (1928) 32 C. W. N. 839 : 48 Cr. L. J. 138 : 30 Cr. L. J. 799 : A. I. R. 1928 C. 700 : 117 I. C. 596.

223. Bansi Dhar (1934) 1934 A. L. J. 1160 : 36 Cr. L. J. 322 : A. I. R. 1934 A. 1032 : 153 I. C. 364.

224. Vasudeo (1932) 56 B. 434 : 33 Cr. L. J. 613 : A. I. R. 1932 B. 279 : 138 I. C. 503.

225. Nathuni (1927) 6 P. 572 : 29 Cr. L. J. 626 : A. I. R. 1928 P. 139 : 109 I. C. 898.

only in these cases which fall under S 289 (2) that the Judge can direct the Jury to return a verdict of not guilty.²²⁶

A Judge commits an error of law if he directs the Jury to return a verdict of not guilty merely because he holds that there is "no evidence worth the name" against an accused; "no evidence worth the name" is under the law a very different thing from no evidence.²²⁷ In a trial by Jury the Judge in discussing the evidence in his summing up pointed out to the Jury that one fact, even if believed, had very little weight, that another fact, if believed, did not show that the accused took part in the offence, and that a third fact amounted to nothing in itself. *Held*, that although the Judge clearly invited the Jury to acquit, yet he ought to have gone further and told the Jury that there was no evidence against the accused and his omission to do so amounted to a misdirection sufficient to entitle the accused to an acquittal.²²⁸

Where the Judge in his charge omitted to remind the Jury that statements attributed to individual accused would not be evidence against the other accused in the event of the Jury finding that individual not guilty, and also repeatedly stated the case for the prosecution and the arguments advanced in support of it without clearly pointing out to the Jury those parts which were not supported by evidence or depended merely upon glosses upon evidence, and further stated that one of the accused was suffering from venereal disease while there was no such evidence, and with regard to certain anonymous petitions told the Jury that evidence given on oath was of greater value than statements made by unknown persons in anonymous petitions, when there was nothing to show that the statements were made, whereas he ought to have told them that this evidence which had been improperly admitted, was of no value and directed them to reject it as irrelevant, and referred to contents of other inadmissible and irrelevant documents, and repeatedly drew the Jury's attention to the fact that the accused had failed to give any explanation of facts adduced in evidence against him : *Held*, that these amounted to misdirection and non-direction.²²⁹

5. Directions as regards Discrepancies.—

Where there is conflicting evidence on any material point, the special attention of the Jury should be called to it in order that they may consider which view of the facts is the true one.²³⁰ It is the duty of the Judge in his summing up to repeat in some form the gists of the Counsel's arguments and the alleged discrepancies in the evidence and not to deal with the case as though the discrepancies in the evidence were of no value and the arguments of

226. *Rup Narain* (1930) 10 P. 140 : 32 Cr. L. J. 975 : A. I. R. 1931 P. 172 : 132 I. C. 876 [referring to *Ramcharitar* (1927) 7 P. 15 : 28 Cr. L. J. 692 : A. I. R. 1927 P. 370 : 103 I. C. 548 ; *Upendra* (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; *Ryder v. Wombell* (1869) 4 Ex. 32 : 19 L. T. 491 : 17 W. R. 167]

227. *Rahamali* (1925) 26 Cr. L. J. 1151 : A. I. R. 1925 C. 1055 : 88 I. C. 463.

228. *Asimuddin* (1920) 32 C. L. J. 89 : 22 Cr. L. J. 60 : 59 I. C. 204. *See also* *Greedhary* (1867) 7 W. R. 39 ; *Rutton* (1871) 16 W. R. 19.

229. *Benoyendra* (1936) 40 C. W. N. 432 : 37 Cr. L. J. 394 : A. I. R. 1936 C. 73 : 161 I. C. 74.

230. *Sugaligadu* (1898) 2 Weir 500.

the Counsel may be safely ignored.²³¹ Merely telling the Jury that there are discrepancies or material discrepancies, without setting out the discrepancies, amounts to a misdirection.²³² The more essential items of discrepancies and contradictions and the important arguments advanced for the defence should be referred to ; mere reference to the arguments of the pleaders is insufficient.²³³

No improper suggestion should be made to minimise the effect of discrepancies. Where a Sessions Judge, in order to explain the discrepancies as between statements of witnesses recorded by the Police and their evidence given in Court, said :—"Undoubtedly the discrepancies * * were a matter for serious consideration. The statements to the Jemadar were recorded by him on the day of the occurrence and if they had been correctly taken down they are more likely to be truthful than those made in Court a month afterwards. Now, there are two suppositions which might be made as to the discrepancies. The first was that the Jemadar has not accurately taken down the statements. The other was that the witnesses had not really mentioned R and B as giving the order, and that their present statements, to that effect, and other alterations from their former statements, were subsequent inventions of the witnesses. As regards the first supposition it was no doubt the case that the Police did not always record statements correctly. This might arise from dishonesty and collusion, and it was evident in this case that wealth was on the side of the prisoners. Some of them were Zemindars and Mukrareedars, while Mewa Singh and Radha Singh were poor men who had been sold out of their lands and almost out of their houses ; or there might be mere neglect or stupidity without dishonesty." *Held*, that the suggestion which the Judge made was improper, there being no evidence that the prisoners or any person on their behalf attempted to tamper with the Police Jemadar.²³⁴ A remark of the Judge in the summing up to the effect—"Many juries have given verdicts which surprised him and on enquiring the reasons for such verdict he was informed that there were discrepancies in the evidence"—was condemned by the High Court.²³⁵ A witness, in his deposition before the Magistrate, omitted to mention more than two of the accused persons. The Judge pointed out to the Jury the reason given by the Magistrate for that omission, that reason being that at the time when the deposition was being taken, he was in such a weak state that the Magistrate was unable to proceed with the examination and had only asked him two questions when the excessive weakness of the witness obliged him to stop. It was contended that this was a misdirection as it was not evidence which ought to have been laid before the Jury, and that to make it evidence the Magistrate's deposition ought to have been taken as to the truth of the fact testified to by him. *Held*, that the objection was untenable : the Magistrate's attestation in all parallel cases, such as the evidence of the witness, or the statement of an accused person, is conclusive proof of the fact of that deposition, unless the Court has reason to suppose that the

231. *Nehru Mal* (1927) 2 Luck 597 : 28 Cr. L. J. 683 : A. I. R. 1927 O. 259 : 103 I. C. 411.

232. *Enayat Husain* (1926) 49 A. 209 : 28 Cr. L. J. 15 : A. I. R. 1926 A. 752 : 99 I. C. 47 ;
Tenaram (1920) 25 C. W. N. 142 : 33 C. L. J. 180 : 22 Cr. L. J. 475 : 61 I. C. 1003.

233. *Hari Charan* (1921) 34 C. L. J. 512 : 23 Cr. L. J. 342 : 66 I. C. 998.

234. *Roghuni Singh* (1882) 9 C. 455 : 11 C. L. R. 569.

235. *Muthoora Singh* (1872) 18 W. R. 66.

attestation was improperly attached to the document ; and that, therefore, in the present case the Magistrate's attestation could be put before the Jury as proof of the facts noted therein, leaving it to the Jury to form their own opinion of the facts.²³⁶ When a Sessions Judge in his charge to the Jury observed :—"If you are satisfied that there was no object in proving a false case, not from the point of view of seeking for small discrepancies, but on a broad view of the evidence given before you &c." : *Held*, that it is not a misdirection as the Judge has done what he ought to have done, viz., to point out to the Jury the way in which minor discrepancies is to be looked into.²³⁷ The Judge had said :—"A large number of witnesses have sworn to the facts before related ; and if a minor discrepancy in their evidence is here and there discoverable I do not think that such stress should be laid upon them as the Vakil for the defence urges or that you should, on such grounds only, reject the whole of their testimony". Complaining of misdirection, it was contended that as the Jury system is new to the country and the native character is to do what the Hakim wishes the Judge's charge in the case amounts to misdirection. This contention was rejected, it being observed :—"I am of opinion that in giving this warning to the Jury not to disbelieve a mass of otherwise consistent evidence because in one or two minor and immaterial points the witnesses made different statements, the Judge used a wise discretion ; native juries are too often apt to jump to the conclusion that because a case is weak in one point, the whole charge is false".²³⁸

Omission to draw the attention of the Jury to the discrepancies between the First Information Report and the case as put forward before the Court²³⁹ or to the discrepancies in the evidence of the principal witnesses for the prosecution²⁴⁰ are material instances of misdirections.

6. Directions as to Quantum of Proof.—

In the Trial of Maharajah Nand Kumar, Sir Elijah Impey is reported to have said :—"You will consider on which side the weight of evidence lies, always remembering that in criminal, and more specially in capital cases, you must not weigh the evidence in golden scales ; there ought to be a great difference of weight in the opposite scale before you find the prisoner guilty. In case of property, the stake in each side is equal and the least preponderance of evidence ought to turn the scale, but in a capital case as there can be nothing of equal value to life, you should be thoroughly convinced that there does not remain a possibility of innocence before you give your verdict against the prisoner."²⁴¹ This direction, it is submitted, was wrong. In the first place, there cannot be a conviction merely on the preponderance of weight of testimony ;²⁴² and secondly, to suggest that in capital cases stronger evidence or a higher degree of certainty is required than in other cases is wrong.²⁴³

236. Rasookoollah (1869) 12 W. R. 51.

237. Baijnath (1919) 1 P. L. T. 708 : 22 Cr. L. J. 125 : 59 I. C. 557.

238. Bustee Khan (1864) 1 W. R. 17.

239. Dhiraji (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.

240. Tenaram (1920) 25 C. W. N. 142 : 33 C. L. J. 180 : 22 Cr. L. J. 475 : 61 I. C. 1003.

241. Trial of Maharajah Nand Kumar, with an introduction by Mr. P. Mitter, p. 143.

242. See Woodroffe and Ameer Ali's Law of Evidence (1921) 7th Ed., 114.

243. Lalit Mohan (1921) 49 C. ¶67 : 25 C. W. N.

The Jury have not to return a verdict on their moral belief but upon the legal proof of facts constituting the offence. Where, therefore, a Judge repeatedly tells the Jury that if they are morally convinced of the guilt of the accused, their verdict should be that of guilty, it amounts to a misdirection.²⁴⁴ Where a Jury found an accused person guilty of murder but refused to convict him because there had been no eye-witnesses to the crime, and on a second charge from the Judge refused to convict him at all; *held*, on a reference under S. 263, Act X of 1872, that the Judge ought to have explained to the Jury that the testimony of eye-witness was not necessary to the establishment of a charge of murder and that the Jury, if they had no doubt as to the guilt of the accused, were bound to give effect to the conclusion at which they had arrived.²⁴⁵ The Calcutta High Court impressed the following upon a Sessions Judge:—"The remark that in law the evidence of one witness in certain circumstances is sufficient, but in the present case it would be very unsafe to convict upon the evidence of a man who was beaten, appears to the Court, judging by your own observations, to be uncalled for as it tends unfairly to take away from the witness' credit."²⁴⁶ Also,—“Again, you say in this case that the Assistant Magistrate was wrong because he argues that he saw no reason to discredit the complainant's story or to believe that the complainant would charge the accused if the latter were not the real offender. This remark, the Court observe, is very unreasonable. It would apply to every case in which a violent assault was committed without witnesses where there was previous quarrel; and it follows that in Nuddeah a man may beat another with whom he is at enmity and may do it with impunity provided there is no actual eye-witness. The Court think that you should have told the Jury that they might safely convict on the prosecutor's testimony unless there are some other reasons for thinking it false than the fact of a previous quarrel, for that was at least as good a reason for the conclusion that the accused had beaten the prosecutor, as for the opinion that he has committed perjury in order to bring them into trouble.”²⁴⁷

7. Directions on Circumstantial Evidence.—

It is a fundamental principle, and one of universal application in cases dependent on circumstantial evidence, that in order to justify any inference of guilt, the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt; if the circumstances are found to be as consistent with the innocence as with the guilt of the accused, no inference of guilt should be drawn.²⁴⁸ Circumstantial evidence is evidence of surrounding circumstances which, by undesignated coincidence, is capable of proving a proposition with the accuracy of mathematics.²⁴⁹

788 : 22 Cr. L. J. 562 : 62 I. C. 578. See also per Teunon J. in Ashraf Ali (1917) 21 C. W. N. 1152 : 19 Cr. L. J. 81 : 43 I. C. 241. But *Contra* per Shamsul Huda, J. in the same case.

244. Enayat Husain (1926) 49 A. 209 : 28 Cr. L. J. 15 : A. I. R. 1926 A. 752 : 99 I. C. 47.

245. Gokool Kahar (1876) 25 W. R. 36.

246. In re Bujderuddeen, Cr. Letter No. 715 dated the 17th June 1867 : 8 W. R. Cr. Lett. 4.

247. *Ibid*.

248. Hurjez Mul v. Imam Ali (1903) 8 C. W. N. 278 (F.B) : 1 Cr. L. J. 124.

249. Taylor (1928) 21 Cr. A. R. 21.

Where it is not pointed out to the Jury that the proved facts are consistent with the prisoner's innocence, the omission amounts to misdirection.²⁵⁰

Sir Charles Fox, C. J., said to a Jury :—"As regards belief in witnesses, juries should not expect the witnesses to come to the reputed standard of Washington but must take people as they are and try and discover the truth by close consideration of each one's evidence in order that truth may prevail and that justice may be done in the acquittal of an innocent man or in the conviction of a guilty man * * In ending I will quote to you the words of a very eminent Judge in a similar case, similar in the sense that the case rested entirely on circumstantial evidence as this case does. This learned Judge said,—“Mr. So and So (*i.e.*, Counsel for the defence) in his speech used two or three times the word ‘certainty’. Rightly understood it is not a wrong word, and rightly understood it is not a misleading word ; but if by that it was to be supposed that juries were not to act upon evidence unless it put them in the position of actually seeing the thing done, then, of course, it was a misleading expression. They had to be satisfied upon the whole evidence beyond reasonable doubt, as they would be on any important question in their lives on which they have to take action one way or the other. They must be satisfied on the evidence that the Crown had made out their case ; if they had not, the prisoner is entitled to an acquittal.”²⁵¹

It is a misdirection to fail to point out to the Jury that the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt.²⁵² It is a misdirection to fail to point out to the Jury that an alternative innocent interpretation may be put upon the proved facts.²⁵³ The Jury should be told that circumstances calling for explanation are not to be confused with those establishing guilt.²⁵⁴ An alternative theory put forward by the defence, which is consistent with the evidence, ought not to be ignored in the summing up.²⁵⁵ In a case of circumstantial evidence the Judge should point out to the Jury that the accused cannot be convicted unless the circumstances are such that there can be no reasonable possibility of the innocence of the accused.²⁵⁶ When the facts are consistent with the prisoner's innocence as with his guilt, innocence must be presumed ; and criminal intent or knowledge is not necessarily imputable to every man who acts contrary to the provisions of the law.²⁵⁷ Where the main principles to be followed in appreciating circumstantial evidence were not explained to the Jury, it was held that there was a misdirection causing failure of justice and a retrial should be ordered.²⁵⁸

In the case of circumstantial evidence the Jury have a two-fold task : They must decide what portions of the evidence have been established and then see whether they constitute

250. Vassileva (1911) 6 Cr. A. R. 231.

251. Ali Cassim (1910) 4 Bur. L. T. 97 : 12 Cr. L. J. 329 : 10 I. C. 929.

252. Santiram (1930) 58 C. 96 : 32 Cr. L. J. 10 : A. I. R. 1930 C. 370 : 127 I. C. 657 ; Sagiruddin (1927) 30 Cr. L. J. 120 : A. I. R. 1928 C. 551 : 113 I. C. 280.

253. Vassileva (1911) 6 Cr. A. R. 231.

254. Lewis (1919) 14 Cr. A. R. 33.

255. Turkington (1930) 22 Cr. A. R. 91.

256. Sagiruddin (1927) 30 Cr. L. J. 120 : A. I. R. 1928 C. 551 : 113 I. C. 280.

257. Nobokisto (1867) 8 W. R. 87.

258. Jahura Bibi (1930) 35 C. W. N. 169 : 52 C. L. J. 417 : 32 Cr. L. J. 418 : A. I. R. 1931 C. 11 : 129 I. C. 677.

sufficient proof, *i. e.*, whether the facts proved exclude the possibility that the deed was done by some other person, and if they have doubts, they must let the prisoner have the benefit.²⁵⁹

8. Directions on Question of Identification of the accused.—

On the question of identification by witnesses the Jury ought to be warned, if it be the fact, that the witness when first examined as such professed himself unable to identify satisfactorily, or when examined before the Magistrate failed to identify him.²⁶⁰ When the only witness to the identification of the accused has at one time expressed doubt about his own correctness, the attention of the Jury should be drawn to that fact.²⁶¹

The summing up as to identification must be accurate; where the summing up was calculated to leave an impression in the minds of the Jury that the accused was identified by four persons and that the stolen property was found in the possession of the accused, whereas in fact the accused was identified by two persons and the property was found in a house which was not the house of the accused: *Held*, that it was a misdirection which must have misled the Jury.²⁶²

Weaknesses in the evidence of identification should be carefully pointed out to the Jury. Where a Sessions Judge failed to bring to the notice of the Jury a fact of great importance elicited in cross-examination, viz, that the only witness who identified the accused was terrified and not in his proper senses on the night of the dacoity: *Held*, that the failure to do so amounted to a misdirection.²⁶³ Where a prosecution witness, who identified the accused for the first time six weeks after the occurrence of the dacoity, said that he did not identify them at an earlier identification parade, but there was no other evidence whether the accused were or were not present at that parade and yet the Sessions Judge wrongly told the Jury that the accused were not present at it; *held*, that it was a misdirection.²⁶⁴ Where a Judge, in laying the evidence before the Jury on the point of the identification of the prisoners, while pointing out the weak points, viz, that the night was dark and that none of them was named in the early stage of the Police investigation, suggested certain theories of his own as regards the truth of the identification, but omitted to add that it was for the Jury to form their own opinion on the evidence: *Held*, that it was not the correct way of placing the evidence before the Jury.²⁶⁵

Identification proceedings outside Court amount merely to this that certain persons are brought to a jail or some other place and make statements, either express or implied, that certain individuals whom they point out are persons whom they recognise as having been concerned in a particular crime. These statements are not made on oath and are made in the course of extra-judicial proceedings. The law does not allow statements of this kind to be made

259. *Browning* (1916) 18 Cr. L. J. 482 : 39 I. C. 322 (Punj.).

260. *Jaffir Ali* (1873) 19 W. R. 57.

261. *Mc Locklin* (1930) 22 Cr. A. R. 138.

262. *In re Manjunatha* (1908) 5 M. L. T. 134 : 11 Cr. L. J. 187 : 4 I. C. 1103.

263. *Venkattan* (1912) 13 Cr. L. J. 271 : 14 I. C. 655. (M.).

264. *Ibid.*

265. *Bepin* (1884) 10 C. 970.

available as evidence at the trial unless and until the persons who made these statements are called as witnesses. When they are so called, these previous statements become admissible, not as substantial evidence in the case, but only as evidence to corroborate or contradict the statements made by them as witnesses in Court. Where a witness to identity is called in the Sessions Court and states that he can identify no one, there is nothing to corroborate and the evidence of any previous statements, express or implied, made by him in the course of identification proceedings in the jail, is not admissible.²⁶⁶

Where the Judge did not charge the Jury with respect to the peculiar nature of the test identification, the non-direction is of a nature which must inevitably have misled the Jury as to the value of the identification by the witness; in this case, at an identification parade, forty-four suspected persons were put with only fifteen non-suspected persons and the only evidence against the accused was the retracted confession of the co-accused and the evidence of the witness who pointed out the prisoners at the identification.²⁶⁷ Where the accused raises the defence that he was not the accused and the case was one of mistaken identity, from the very first moment and before he had any opportunity of getting into touch with a pleader, the only safe way of ascertaining whether the prosecution witnesses could be relied upon when they said that they could identify the accused would be to hold an identification test.²⁶⁸ Where the Judge failed to refer to the omission to hold a test identification and also refrained from dealing with the value of the evidence in Court as regards certain aspects of it: *Held*, that there was a misdirection vitiating the conviction.²⁶⁹

In a trial with the aid of a Jury the evidence of identification was that the witnesses who knew the accused from a long time recognised the accused only in the diffused light of the torches in their hands; and the Judge allowed the Jury to make an experiment about the identification of the accused (in the absence of the accused) by reason of which the Jury ultimately brought in their verdict, a verdict which the jurors were not in a position to deliver before the experiment was allowed to be made; *Held*, that there was a serious irregularity and the verdict of the Jury in such circumstances was not proper and must be set aside.²⁷⁰

There may be sufficient identification of a person by his voice.²⁷¹ But it is improper to place a voice-test before the Jury for the purpose of weighing the evidence of identification, and such a procedure has been condemned.²⁷²

266. Bhagat Ram (1934) 36 Cr. L. J. 121 : A. I. R. 1934 L. 641 : 152 I. C. 531 [referring to Nagina (1921) 19 A. L. J. 947 : 27 Cr. L. J. 813 : 95 I. C. 477 ; and distinguishing Abdul Wahab (1924) 47 A. 39 : 27 Cr. L. J. 836 : A. I. R. 1925 A. 223 : 95 I. C. 756.]

267. Kuldip Singh (1934) 15 P. L. T. 803 : 36 Cr. L. J. 28 : A. I. R. 1934 P. 537 : 152 I. C. 126.

268. Molla Khan (1933) 37 C.W.N. 1061 (S.B.) : 35

Cr. L. J. 601 : A. I. R. 1934 C. 169 : 148 I. C. 172.

269. *Ibid*.

270. Sarup Ali (1934) 38 C.W.N. 1154 : 60 C. L. J. 194 : 36 Cr. L. J. 129 : A. I. R. 1934 C. 744 : 152 I. C. 661.

271. Keating (1909) 2 Cr. A. R. 61.

272. Arshed Ali (1924) 30 C. W. N. 166 : 27 Cr. L. J. 378 : 92 I. C. 890.

9. Directions in cases where there are Several Accused persons.—

The Jury must be told to give their verdict on the facts as against each accused severally, and they are not, like the Judge, in charge of the entire case as a whole.²⁷³ Where several accused persons are involved, not to sum up separately against each is an omission which amounts to misdirection.²⁷⁴ When the case against all the accused persons jointly tried does not stand on the same footing, the Judge must ask the Jury to consider the case against each of the accused individually; omission in this respect is likely to cause prejudice.²⁷⁵ In such cases the strength or weakness of the evidence of the witnesses as against each of the accused individually should be pointed out to the Jury.²⁷⁶ When defendants are tried together and set up different defences, the direction to the Jury must state clearly the difference.²⁷⁷ In a case of joint trial of several prisoners the direction must carefully distinguish between the cases of each and it is a grave misdirection to suggest wrongly that if one is guilty another must also be guilty.²⁷⁸

The Judge must warn the Jury that the case of each accused must be separately considered and the charge must marshal the evidence against each separately unless it be one of those cases in which the evidence against all the accused stands on the same footing; and omission to do so is a serious misdirection.²⁷⁹ As for instance, where the evidence in the case is such that it affects all the accused equally or not at all and there is nothing to distinguish the case made by the prosecution against any one of the accused from the case made against any other of them, no injustice is done to the accused by not putting the evidence against each of the accused persons individually; though generally it is desirable and obligatory that a Judge, in summing up to the Jury, should divide up the evidence as it affects each individual accused.²⁸⁰ Where the Judge failed to point out the guilt of each of the persons charged with the offence of rioting, regarding all the accused as a body of men and not as individuals: *Held*, that the trial was vitiated by misdirection.²⁸¹ In dealing with each individual prisoner he must take the evidence against each one, summarize it, and point out clearly to the Jury how each prisoner is affected by the evidence which has been given.²⁸² In charging the

273. Jamiruddi (1912) 16 C. W. N. 909 : 13 Cr. L. J. 715 : 16 I. C. 523 ; Asanulla (1935) 62 C. 911 : 39 C. W. N. 924 : 36 Cr. L. J. 1246 : A. I. R. 1935 C. 534 : 157 I. C. 837.

274. *In re Sangar* (1915) 17 Cr. L. J. 19 : 32 I. C. 147 (M) ; Meher Sheikh (1931) 59 C. 8 : 35 C. W. N. 945 : 32 Cr. L. J. 892 : A. I. R. 1931 C. 414 : 132 I. C. 254.

275. Khijiruddin (1925) 53 C. 372 : 42 C. L. J. 504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.

276. Jessarat (1925) 29 C. W. N. 526 : 26 Cr. L. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

277. Rowan (1910) 5 Cr. A. R. 279 ; Lovett (1921) 16 Cr. A. R. 16, 41 ; Dean (1924) 18 Cr. A. R.

21 ; Mac Donald (1928) 20 Cr. A. R. 163 ; Brooks (1928) 21 Cr. A. R. 112.

278. Graham (1919) 14 Cr. A. R. 7 ; Mathews (1919) 14 Cr. A. R. 23.

279. Abdul Aziz (1934) 30 N. L. R. 262 : 35 Cr. L. J. 957 : A. I. R. 1934 N. 94 : 149 I. C. 447 ; Khijiruddin (1925) 53 C. 372 : 42 C. L. J. 504 ; 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442 ; Jamiruddi (1902) 29 C. 782 : 6 C. W. N. 553.

280. Khoda Bux (1933) 61 C. 6 : 37 C. W. N. 1122 : 35 Cr. L. J. 554 : A. I. R. 1934 C. 105 : 147 I. C. 1124.

281. Dakhani (1932) 55 A. 68 : 34 Cr. L. J. 441 : A. I. R. 1933 A. 128 : 142 I. C. 800.

282. Akbar Seikh (1930) 35 C. W. N. 404 : 33

Jury the Judge should set out clearly the evidence as against each prisoner separately and should not place before them all the evidence as against all the prisoners in a confused mass.²⁸³ He should at the same time set out the evidence, if any, in favour of each prisoner.²⁸⁴ But the omission to put to the Jury the exact evidence against each accused is not a misdirection when the Judge has discussed the whole of it and has told them to be satisfied as to the guilt of and to return an independent verdict against each accused.²⁸⁵ Where in a trial of three accused persons the evidence against one was not the same as that against the other two but less : *Held*, that the omission of the Judge in his summing up to deal with and discuss the evidence against him individually and separately from that of the other two was a serious misdirection making his conviction untenable.²⁸⁶

Three defendants were separately charged with robbery and violence. At the trial the Judge in summing up made a statement to the effect that the defence of the first defendant, unlike those of the two other defendants, was not disclosed at the Police Court, so that the Police had not the same opportunity of inquiring into his case as into those of the other defendants : *Held*, that the statement was not improper and did not constitute misdirection in as much as though it might not have been favourable to the first defendant, it was necessary that it should be made in fairness to the other two defendants.²⁸⁷

It will be observed that while there is any amount of judicial decisions laying down rules for the guidance of Judges as to how evidence adduced on behalf of the prosecution shall be dealt with in the summing up, there are very few which specifically concern the subject of summing up of the evidence adduced on behalf of the defence. There are several reasons why this has been so. For, in the first place, in Sessions cases the accused persons seldom examine witnesses in their defence. Next, if the summing up of the defence evidence is found objectionable, the objection is often due, not so much to the manner in which that evidence has been placed before the Jury, but because some cardinal rule as regards presumption, onus of proof, or the benefit of the doubt, &c., has been contravened. These subjects will be found dealt with separately in this book in their proper places. Here we shall deal only with topic '*How to deal with the defence*'.

10. How to deal with the Defence.—

A proper presentation of the defence in a summing up is the very essence of a fair trial. How much a prisoner feels if he finds that his defence has not been adequately and properly placed before the Jury for their consideration, is a matter which can hardly be described. It should, as a general rule, be carefully laid before the Jury even though to the Judge it may seem absolutely worthless. Lady Alice Lisle, tried for High Treason by Lord Chief

Gr. L. J. 486 : A. I. R. 1932 C. 395 : 137 I. C. 682.

283. Dakshinamurthy (1901) 2 Weir 517.

284. Sugalgadu (1898) 2 Weir 500.

285. Samaruddi (1912) 40 C. 367 : 13 Gr. L. J. 821 : 17 I. C. 565.

286. Miajan (1932) 37 C. W. N. 68 : 34 Gr. L. J. 622 : A. I. R. 1933 C. 5 : 143 I. C. 682.

287. Parker (1933) 24 Cr. A. R. 2 : 102 L. J. K. B. 766.

Justice Jeffreys, handed a paper to the Sheriff before her execution on September 2nd, 1865, containing her farewell. It was stated in it :—"I have been told that the Court ought to be Counsel for the prisoner, instead of which there was evidence given from thence, which though it was but hearsay might possibly affect my Jury. My defence was such as might be expected from a weak woman ; but such as it was, I did not hear it repeated again to the Jury. But I forgive all persons that have done me wrong and I desire that God will do likewise." Sir Elijah Impey, C. J., in his charge to the Jury in Maharajah Nand Kumar's Case put the defence of the prisoner before the Jury in words which were hardly fair. He said,— "The nature of the defence in this case is such that if it is not believed it must prove fatal to the party ; for if you do not believe it, you determine that it is supported by perjury, and that of an aggravated kind, as it attempts to fix perjury and subornation of perjury on the prosecutor and his witnesses."²⁸⁸

The prisoner's defence must be put to the Jury.²⁸⁹ The Judge's duty is to place before the Jury in a coherent manner the salient points arising on the evidence adduced before the Jury and it is no part of his duty to make a second speech on behalf of the defence.²⁹⁰ The defences of the different prisoners have to be separately put.²⁹¹ Whatever may be the line of defence adopted by the Counsel for the prisoner at the trial, the Judge is bound to put to the Jury such questions as appear to him properly to arise upon the evidence, although Counsel himself may not have raised the points.²⁹² The mere fact that Counsel for the defence has not taken a point of law does not affect the Judge's duty to take it.²⁹³ An alternative theory put forward by the defence, which is consistent with the defence, ought not to be ignored in the summing up.²⁹⁴ Even where no alternative defence was put forward but the facts warrant it, it must be properly put to the Jury.²⁹⁵ But omission to tell the Jury in terms what the defence is does not amount to misdirection, if the issues in the case are in substance put to the Jury in the summing up.²⁹⁶ The Judge is not bound to put the defence in his summing up, if in law such defence is not made out.²⁹⁷

The charge must bring to the notice of the Jury important factors in favour of the accused and the improbabilities in the evidence ; it is not enough to say that the learned pleader for the defence has presented the case for the defence and leave it at that.²⁹⁸ The Judge must analyse the evidence and place before the Jury all facts which legitimately arise in favour

288. Trial of Maharajah Nand Kumar, with an introduction by P. Mittra, p. 143.

289. Dennick (1909) 3 Cr. A. R. 77 ; Hill (1911) 7 Cr. A. R. 26 ; Bacon (1917) 13 Cr. A. R. 36 ; Thompson (1921) 16 Cr. A. R. 6 ; Marriott (1924) 18 Cr. A. R. 74.

290. Jati Mali (1929) 57 C. 248 : 33 C. W. N. 918 : 31 Cr. L. J. 857 : A. I. R. 1929 C. 765 : 125 I. C. 599.

291. Pritchard (1913) 9 Cr. A. R. 210 ; Rowan (1910) 5 Cr. A. R. 279, 282 ; Batty (1912) 7 Cr. A. R. 286.

292. Hopper (1915) 11 Cr. A. 136.

293. Smith (1916) 12 Cr. A. R. 42.

294. Turkington (1930) 22 Cr. A. R. 91.

295. Hopper (1915) 11 Cr. A. R. 136.

296. Bradshaw (1910) 4 Cr. A. R. 280.

297. Honeyands (1914) 10 Cr. A. R. 60.

298. Abdul Aziz (1934) 30 N. L. R. 262 : 35 Cr. L. J. 957 : A. I. R. 1934 N. 94 : 149 I. C. 447. See also Dwarkanath (1933) 37 C. W. N. 514 (P. C.) : 57 C. L. J. 177 : 14 P. L. T. 305 : 35 Bom. L. R. 507 : 64 M. L. J. 466 : 1933 A. L. J. 645 : 10 O. W. N. 522 : 34

of the accused.²⁹⁹ It is not the function of the Judge to repeat to the Jury every argument or suggestion urged on behalf of the defence ; if the defence is substantially put to the Jury, a mere omission to refer to this or that circumstance or suggestion is not non-direction which amounts to misdirection.³⁰⁰ It is not necessary that the Judge should refer to every possible points in favour of the accused ; it is sufficient if he deals with the more important ones,³⁰¹ or the more essential points and arguments.³⁰² Omission to put the defence case adequately before the Jury,³⁰³ or to call their attention to those points which are in favour of the accused,³⁰⁴ is misdirection. A verdict obtained from the Jury without placing before them an important piece of evidence in favour of the defence, whatever may have been its real worth, can not be sustained.³⁰⁵ But where there is no evidence for the defence, only the evidence for the prosecution remains to be summed up ; consequently, a discussion of the prosecution evidence only cannot go to characterize the charge as a wholly one-sided charge ; the Judge is right, under the circumstances, in drawing the attention of the Jury to the fact that there was no evidence to contradict the prosecution evidence ; and his statement in the charge that there was absolutely no reason to disbelieve the prosecution witnesses, does not constitute misdirection when he adds at the end of his charge that the Jury are the sole judges of questions of fact.³⁰⁶

The Judge should not speak disparagingly of the quality of the evidence for the defence. Where he did so, the High Court observed :—"What is still more extraordinary is that the Jury were told that the evidence put in by the defence was in some cases of such poor quality as to insult the Court before which it was produced. This direction coming after the Judge's observation that the documents put in by the defence conclusively disproved partition (which was the case for the prosecution) was apt to mislead the Jury. All that he could properly state was how the evidence stood and whether in his opinion it is credible, pointing out at the same time the points which specially told in favour of the defence. Instead of that his direction practically amounts to a direction that the Jury were bound to reject most of the evidence.³⁰⁷ A Judge should not ridicule the defence at the very outset of the charge before the discussion of the evidence, because that may have a pernicious influence on the minds of the Jury and make them distrust the defence theory without giving sufficient reason for it.³⁰⁸ Where a Sessions Judge put various matters before the Jury in a fashion which left to the Jury broad hints that

Cr. L. J. 322 : A. I. R. 1933 P. C. 124 : 142 I. C. 335.

299. Hari (1934) 28 S. L. R. 397 : 36 Cr. L. J. 1161 : A. I. R. 1935 S. 145 : 157 I. C. 697.

300. Manar Ali (1933) 60 C. 1339 : 37 C. W. N. 1066 : 58 C. L. J. 66 : 35 Cr. L. J. 567 : A. I. R. 1934 C. 124 : 147 I. C. 1203.

301. Abdul Salim (1921) 49 C. 573 : 26 C. W. N. 680 : 35 C. L. J. 279 : 23 Cr. L. J. 657 : A. I. R. 1923, C. 107 : 69 I. C. 145.

302. Hari Charan (1921) 34 C. L. J. 512 : 23 Cr. L. J. 342 : 66 I. C. 998.

303. In re Vollyan (1925) 27 Cr. L. J. 176 : A. I. R. 1926 M. 370 : 9 I. C. 960.

304. Rahamat Ali (1900) 4 C. W. N. 196.

305. Khijiruddin (1925) 53 C. 372 : 42 C. L. J. 504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.

306. Srikishen (1935) 37 Cr. L. J. 173 : A. I. R. 1935 A. 928 : 159 I. C. 900.

307. Mira Gajbar (1930) 6 Bom L. R. 31 : 1 Cr. L. J. 1.

308. Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925, S. 116 : 81 I. C. 249.

the case for the defence as regards the particular matter required little consideration ; *held*, that the charge was bad.³⁰⁹ A Judge charged the Jury thus :—"As for the defence of the other accused, the Vakils for the defence have not laid much emphasis upon it and so it is unnecessary to go into it. You have heard how, when I now asked them to place the defence for the other accused before you, they said that the defence on the whole would rather be content with challenging the credibility of the prosecution evidence, than to rely upon the evidence they have put in". And the Judge omitted to place before the Jury the evidence regarding the *alibi* set up by the defence. It was held that the fact that the Vakils did not lay much emphasis on the defence evidence is no reason why the Judge himself should not place it before the Jury. Such a summing up is in contravention to Ss. 297-299, which make it imperative to place the evidence both for the prosecution and for the defence.³¹⁰ The Judge should not belittle the worth of the evidence in favour of the accused ; it is a very improper way of dealing with answers given by a witness which are favourable to the defence to suggest to the Jury that the answers might have been given without properly understanding the questions ; if it is possible in any case that the witness might have misunderstood a question put to him, the facts which lead to that inference should be placed before the Jury for their consideration.³¹¹

But the Judge need not discuss the defence, when if he had done so he might have done it unfavourably to the defence.³¹² If the story given by a witness, though consistent with the defence, is too absurd to be believed, it is no misdirection not to ask the Jury to consider it. Warden, J. said :—"I have never before, in the whole course of my experience, heard of a thief, no matter what his caste may be, committing or attempting to commit suicide, when he found himself detected in the commission of a burglary ; and it is even more absurd to suppose that the accused, and one of them, a female of high caste, would have laid hold of a thief and struggled with him to prevent his cutting his own throat, if he felt so disposed. I therefore think that the Sessions Judge very properly refrained from requiring the Jury to take this story into consideration."³¹³ Where a Sessions Judge in summing up the case to the Jury omitted to call their attention to the evidence of the witnesses for the defence, but it appeared that the principal witness for the defence was wholly unreliable and all the witnesses had made statements which were conflicting and contradictory, the High Court said :—"We have no hesitation in saying that the Judge, by making no reference to it (the evidence of the witnesses for the defence) in his charge to the Jury, acted favourably rather than otherwise towards the prisoner. For, if reference had been made to that evidence, it would at the same time have been necessary to point out to the Jury that the witnesses were not in accord with one another and that their statements were discrepant and that the principal witness now relied upon for the defence was really unreliable."³¹⁴

309. *Isu Sheikh* (1926) 31 C. W. N. 171 : 45 C. L. J. 584 : 28 Cr. L. J. 201 : A. I. R. 1927 C. 200 : 99 I. C. 937.

310. *In re Sangan* (1915) 17 Cr. L. J. 19 : 32 I. C. 147 (M).

311. *Sagruddin* (1927) 30 Cr. L. J. 120 : A. I. R. 1928 C. 551 : 113 I. C. 280.

312. *Nicholls* (1908) 1 Cr. A. R. 167.

313. *Fattechand* (1868) 5 Bom. H. C. R. 85.

314. *Rochia Mohato* (1881) 7 C. 42 : 8 C. L. R. 273.

The defence of *alibi* must be expressly left to the Jury ; it is not for the Judge to say that it has broken down ; the Jury should be directed that they cannot convict unless they definitely reject it.³¹⁵ Jury should be directed that they cannot disregard evidence of *alibi*, unless there is stronger evidence against it.³¹⁶ If the *alibi* fails, the Jury should be warned to consider the facts of the case on the merits.³¹⁷ Omission by the Judge to refer to the plea of *alibi* and to the evidence bearing on it is misdirection.³¹⁸ A Sessions Judge omitted to point out to the Jury the evidence of the prisoner's witnesses and passed them over with the remark that that evidence was not important ; this evidence, however, was of vital importance in as much as, if believed, it proved that the prisoner could not have been present at the occurrence. *Held*, that the trial could not stand.³¹⁹ Where the plea of the accused was that they were not present at the occurrence and the Judge referred to the plea at the beginning of the charge but omitted all reference to it in the subsequent part of the charge and did not tell the Jury that they must, before they found the accused guilty, find that they were present at the occurrence : *Held*, that the charge was unsatisfactory.³²⁰ Where an accused pleaded *alibi* in a case in which he was charged with having committed a dacoity at 7-30 p.m. and alleged that at 8-30 p.m. he was released by a Magistrate in another case and so could not have been concerned in the occurrence which had taken place at 7-30 p.m. ; and an application for bail was made before a Magistrate before whom he was placed after his arrest for dacoity and he stated this fact in one of the grounds of the petition and that Magistrate being examined as a witness said that the fact was not brought to his attention, but the Sessions Judge told the Jury that the obvious answer to the defence argument was that if the Magistrate accepted the statement as true he would have granted the bail : *Held*, it was a clear misdirection.³²¹ When there was evidence showing that the accused had left the place of occurrence before the occurrence took place and the Judge omitted to bring that evidence specifically to the notice of the Jury : *Held*, that the omission amounted to misdirection.³²²

The Judge should make it clear to the Jury that mere suggestion does not amount to proof and that when a definite case is set up by the accused it is for him to substantiate it ; and the presumption of innocence does not amount to a presumption that the witnesses are perjured.³²³ Where no specific case has been put forward on behalf of the accused and the defence really was a denial of the charge, coupled with destructive criticism of the prosecution evidence, the defence case may be deemed to have been properly placed before the Jury if the Judge drew their attention to the discrepancies in the evidence tendered for the

315. Finch (1916) 12 Cr. A. R. 77.

316. Chadwick (1917) 12 Cr. A. R. 247.

317. Chew (1926) 19 Cr. A. R. 73.

318. In re Gangi Reddi (1908) 18 M. L. J. 541 : 8 Cr. L. J. 397 ; In re Sangar (1915) 17 Cr. L. J. 19 : 32 I. C. 147 (M).

319. Mohima (1871) 6 B. L. R. Cr. App. 108.

320. Natabar (1908) 35 C. 531 : 12 C. W. N. 774 : 7 C. L. J. 599 : 8 Cr. L. J. 6.

321. In re Subbu Tevan (1913) 14 M. L. J. 442 : 14 Cr. L. J. 623 : 21 I. C. 671.

322. Ashraf Ali (1917) 21 C. W. N. 1152 : 19 Cr. L. J. 81 : 43 I. C. 241.

323. Ardali Mian (1933) 35 Cr. L. J. 56 : A. I. R. 1933 P. 496 : 146 I. C. 460 [referring to Ghanshyam (1927) 6 P. 627 : 29 Cr. L. J. 239 : A. I. R. 1928 P. 100 : 107 I. C. 305].

prosecution and the criticism levelled against it by the accused ; the fact that the Judge omitted to charge the Jury formally that the defence case was to make a complete denial of the prosecution case is not material.³²⁴ But where suggestions have been made by the accused, the Judge should put them before the Jury. Thus, where the defence in cross-examining a prosecution witness asked whether two other men did not beat the deceased, and the accused in his written statement gave an account suggesting that he was not the culprit : *Held*, that it was a misdirection for the Judge to tell the Jury that there was no suggestion that any one other than the accused was the culprit. Again, where the charge to the Jury ended abruptly with the statement,—‘No evidence adduced by the defence’ : *Held*, that if the Judge thought it necessary to put this fact so prominently to the Jury, he was at least bound to qualify it by pointing out to the Jury that the defence was not bound to adduce any evidence, that they could rely upon the prosecution evidence as far as it helped them and that they were entitled to the benefit of doubt ; and that the omission of these qualifying statements constituted a misdirection.³²⁵

The fact that the pleader for the accused does not urge any particular defence is no reason why that defence should not go to the Jury in the summing up by the Judge, if there was any evidence whatever in support in the defence.³²⁶ Even if the prisoners simply denied having gone to the land or had anything to do with the occurrence (a riot), if in the cross-examination a defence of exercise of the right of private defence appear or is suggested, it should be placed before the Jury and that defence should be so fairly placed as to ensure that the Jury appreciate the issue or issues which they have to try.³²⁷ Whatever the Judge’s opinion of the defence may be and whatever he may think of the prisoner’s Counsel in dealing with his own evidence, the Judge should state to the Jury accurately the substance of the evidence relied upon by each accused and it is for the Jury alone to decide whether that evidence is worthy of consideration.³²⁸ In undefended cases it is the duty of the Judge to bring forward arguments which would have been used if the accused were represented.³²⁹ Hypothetical defences, however, ought not to be put to the Jury. On this point a most important decision is that of the Full Bench in the case of *Upendra Nath Das*.³³⁰ In view of the importance of the propositions laid down there extracts from the judgments of the learned Judges in that case are given here :—

“The Judge’s duty is to determine whether any evidence has been given on which the Jury could properly find the question (here, whether by reason of the exceptions enu-

324. *Israil* (1932) 59 C. 1123 : 36 C. W. N. 377 : 55 C. L. J. 132 : 33 Cr. L. J. 694 : A. I. R. 1932 C. 536 : 138 I. C. 756.

325. *Asfar Sheikh* (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52.

326. *Golap Ali* (1932) 37 C. W. N. 261 : 35 Cr. L. J. 1078 : A. I. R. 1933 C. 656 : 145 I. C. 821.

327. *Afiruddi* (1919) 23 C. W. N. 833 : 29 C. L. J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485.

328. *Ikramuddin* (1917) 39 A. 348 : 18 Cr. L. J. 491 : 39 I. C. 331.

329. *Mohomed Khan* (1930) 32 Cr. L. J. 172 : A. I. R. 1930 S. 308 : 128 I. C. 673.

330. *Upendra* (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113.

merated in S. 300 I.P.C. the case came under S. 304 I. P. C.) for the party on whom the onus of proof lies. It is not enough to say that there was some evidence. A scintilla of evidence would not justify the Judge in leaving the case to the Jury. There must be evidence on which they might reasonably and properly conclude the fact to be established. (*Ryder v. Wombell* (1864) 4 Ex. 32 at p. 38 : 38 L. J. Ex. 8 : 19 L. T. 491 : 17 W. R. 167, referred to). It is for the Jury to say whether and how far the evidence is to be believed. And if the facts as to which evidence is given are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn or not. But it is for the Judge to determine, subject to review, as a matter of law, whether from those facts that further inference may legitimately be drawn (*Metropolitan Railway Co. v. Jackson* (1877) 3. A. C. 193 : 47 L. J. C. P. 303 : 37 L. T. 679 : 36 W. R. 175, referred to) * * The conduct of a case by Counsel is not a negligible factor even in the Criminal Court though it may not necessarily conclude the accused (*Rex v. Bridgwater* (1905) 1 K. B. 131 at p. 135 : 74 L. J. K. B. 35 : 69 J. P. 26 : 53 W. R. 415 : 91 L. T. 828 : 21 T. L. R. 69 : 20 Cox C. C. 737, referred to). When grave and sudden provocation was no part of the defence case in the Sessions Court, nor is any direct evidence given at the trial of such grave and sudden provocation or of facts from which this exception can be legitimately inferred, the trial Judge is quite justified in excluding inquiry into the exception. In fact, it would be an error on his part to lay down law as to a matter which is not legally and properly before a Jury. It is the duty of the Judge to keep the Jury within proper limits and for this purpose to simplify as far as he can the issues fairly and properly before the Court and direct the minds of the jurors to those issues and those issues alone (*Q. v. Hari Giri* 10 W. R. Cr. 26 : 1 B. L. R. Cr. 11, referred to)".—*Per Jenkins, C. J.*

"It would be a serious error on the part of a Judge to put a suppositious case before the Jury, in order to establish the existence of grave and sudden provocation. The propriety and not the possibility of an inference is the test by which a Judge should decide whether he should suggest a case for the consideration of the Jury on his own initiative. But a Judge fails in his duty if he makes a case himself on which he thinks the Jury cannot properly convict. For, to do so is to mislead the Jury. It is the duty of a Judge to make a case for the accused on which he thinks that a verdict of not guilty may be properly returned, though the case has not been suggested by or on behalf of the accused. It is the duty of the defending Counsel to make the Judge aware of any case that he considers may be made on behalf of the accused though he has not made it himself. When defending Counsel hears a Judge omit in summing up a point that he considers may be made on behalf of the accused, it is a dereliction of duty on his part not to bring the point to the notice of the Judge".—*Per Stephen, J.*

"A Court can and should consider a case in favour of the accused which he has not raised. On the question whether an inference does arise in favour of the accused the fact that a particular defence has or has not been taken may affect the significance of the evidence given".—*Per Woodroffe, J.*

"In S. 297 Cr. P. C. the expression "lay down the law" does not signify "lay down the whole law on the subject irrespective of the facts of the particular case before the Court". The reasonable construction of the Section is that the Judge should lay down the law in so far as it bears upon the evidence adduced in the particular case * * * The mere fact that Counsel for the accused has failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the Judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence ; it would be the duty of the Judge to draw the the attention of the Jury to such possible view of the case on the evidence notwithstanding that it may have escaped the Counsel for the accused. To determine whether there was or was not evidence to go to the Jury, regard must be had to the whole course of the proceedings in the trial Court * * Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the Counsel for the prosecution and for the defence respectively (*Rex v. Stoddart* (1909) 2 Cr. A. R. 217 at p. 246 : 73 J. P. 348 : 53 L. J. 578 : 25 T. L. R. 612, referred to)."—*Per Mookerjee, J.*

"No error of law is committed by a Judge who refrains from directing the Jury as to exceptions which have neither been raised nor relied upon by the accused and have no basis in the evidence on the record. When there is no evidence bringing a case directly within an exception it would be a misdirection to ask the Jury to come to a finding of fact on a hypothetical state of circumstances which do not bring the case within the exception as a matter of law. Indeed, the Court must presume the absence of those circumstances. Section 105 of the Evidence Act is imperative. It would be a most undesirable practice for Judges to put hypothetical defences not taken by the accused before the Jury and might cause serious prejudice to the accused".—(*Jamsheer, in the matter of*, 1 C. L. R. 62 ; and *Q. v. Chakauri* (1898) A. W. N. 209, referred to).—*Per Holmwood, J.*

Another important decision on the subject is the case of *Barendra Kumar Ghose v. E.*³³¹, in which the following propositions were laid down :

"A non-direction when it consists in an omission to put the material facts or to put the defence to the Jury is sufficient to cause the Court to quash the conviction if the Court comes to the conclusion that it is reasonably probable that the verdict of the Jury was affected thereby. * * * The mere fact that the Counsel for the accused has failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the Judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence ; it is the duty of the Judge to draw the attention of the Jury to such possible view of the case on the evidence, notwithstanding that it may have escaped the Counsel for the accused ; in other words, the line of defence adopted by the Counsel does not relieve the Judge of his duty. But the duty which is thus imposed on

331. (1923) 28 C. W. N. 170 (F. B.) : 38 C. L. J.
411 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 :
81 I. C. 353.

the Judge can be discharged only with reference to the evidence adduced at the trial*** A defence made by or for an accused, or apparent on the evidence for the prosecution may be fairly presented to the Jury, as every party to a trial by Jury has a legal and constitutional right to have the case, which he has made, either in prosecution or in defence, fairly submitted to the consideration of that tribunal. If a defence is substantially put to the Jury a mere omission to refer to this or that circumstance or suggestion is not non-direction which amounts to misdirection. It is not the function of the Judge to repeat to the Jury every argument or suggestion urged by the Counsel for the accused.—*Per Mookerjee & Ghose, JJ.* "Putting the accused's case to the Jury cannot possibly mean putting to the Jury every argument and comment of the Counsel for the defence. A charge to the Jury must be read as a whole and also in the light of the questions raised by Counsel during the conduct of the trial".—*Per Cuming, J.*

Where the prisoners have separate defences, such defences should be distinctly put before the Jury for their separate consideration as regard the individual prisoners respectively.³³²

S. 297 of the Code also says that in charging the Jury the Judge should lay down the law by which the Jury are to be guided. S. 298 of the Code consists of two Sub-sections, of which Sub-section (2) has already been referred to in connection with the question whether the Judge is entitled to give his own opinion on questions of fact to the Jury. The other duties of the Judge are enumerated in the four clauses (a) to (d) of Sub-s. (1) of the Section. It will be convenient to deal with these and a few other connected matters as regards summing up under the following heads :—

How to lay down the law.

Discussions on questions of law,—Reference
to judicial decisions, treatises and text-books.

Judge to decide on relevancy or otherwise
of evidence.

Judge to decide on meaning and construction
of documents.

Directions as to onus of proof.

Directions on benefit of the doubt.

11. How to lay down the Law.--

As S. 297 says, the laying down of the law is for the guidance of the Jury to enable them to apply the law as laid down to the facts of which they are the sole Judges, so as to come to a definite conclusion as to whether or not the accused has committed the offence with which he is charged. The Judge cannot shirk his responsibility on this matter ; he must lay down his own view of the law, ³³³ with clearness and distinctness,³³⁴ and that

332. Harendra (1910) 11 Cr. L. J. 538 : 7 I. C. 915 (C).

333. *In re Umbica* (1865) Cr. Lett. No. 689, dated 18th July 1865 : 3 W. R. Cr. Lett. 18.

334. Mohammad Israil (1929) 1929 A. L. J. 1261 : 31 Cr. L. J. 33 : A. I. R. 1930 A. 24 : 120 I. C. 264.

too, authoritatively.³³⁵ The Judge will be in error, if he leaves a question of law to be decided by the Jury.³³⁶ On questions of law the directions of the Judge must be decisive. In a case where a prisoner was charged 1st, with abetting of culpable homicide not amounting to murder, and 2nd, of abetting of voluntarily causing grievous hurt, and the Judge directed the Jury that if they believed the evidence they should find the prisoner guilty of one or other of the offences : *Hobhouse, J.* said.—“Upon the evidence I could have wished that the Judge had summed up more decisively”.³³⁷ Even though the evidence is summed up, omission to lay down or explain the law is a misdirection.³³⁸ But the expression ‘lay down the law’ in S. 297 of the Code does not signify ‘law down the whole law on the subject irrespective of the facts of the particular case before the Court : the reasonable construction of the Section is, that the Judge should lay down the law only in so far as it bears upon the evidence adduced in that particular case.’³³⁹ The Judge’s opinion on questions of law is conclusive ; on questions of fact he can only express his opinion and must leave the decision to the Jury.³⁴⁰ Questions of law arise generally in interpreting the Sections of Penal Code, Criminal Procedure Code and Evidence Act. It is of the utmost importance that the Judge should lay down the law on such questions as they arise in a particular case, for in case he fails or omits to do so, the appellate Court may set aside the verdict of the Jury on the ground of misdirection or misunderstanding on the part of the Jury of the law as laid down by the Judge. [S. 423 Sub-s. (2) Cr. P. C.] Numerous judicial decisions have laid down the rules for the guidance of the Judges and those rules should be followed.³⁴¹

On the question of explaining the law an important decision was given by the Chief Court of Lower Burma. Fox, C. J. and Robinson, J. (Ormond, J. *dissenting*) held that the Jury must, for a proper understanding of the evidence and a due appreciation of its bearing on the offence charged, be told what the law is and what constitute the offence charged and what matters must be proved to their satisfaction to constitute that offence ; that it is imperatively necessary for the presiding Judge to expound the law to them ; and though S. 537 Cr. P. C. refers to any misdirection, yet the whole Section is subject to the provision therein before contained ; and as there is an express provision in S. 297 for the Judge to lay down the law for the guidance of the Jury, S. 537 will not cure the omission, it being a Section intended to cure minor errors and irregularities and not intended to avoid total omissions of express provisions. Ormond, J. observed that it is

335. *Menga* (1895) Rat. 748 ; *Nim Chand* (1873) 20 W. R. 41.

336. *Hadi Husain* (1934) 11 O. W. N. 211 : 35 Cr. L. J. 502 : A. I. R. 1934 O. 122 : 147 I. C. 911.

337. *Doorgessur* (1867) 7 W. R. 61.

338. *Biru Mandal* (1897) 25 C. 561.

339. *Upendra* (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113, *Per Mookherjee, J. ; Adam Ali* (1926) 31

C. W. N. 314 : 45 C. L. J. 131 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718 ; *Fajer Ali* (1933) 57 C. L. J. 583 : 35 Cr. L. J. 536 : A. I. R. 1934 C. 142 : 147 I. C. 1043.

340. *Bansidhar* (1934) 1934 A. L. J. 1160 : 36 Cr. L. J. 322 : A. I. R. 1934 A. 1032 : 153 I. C. 364.

341. *Nehru Mal* (1927) 2 Luck. 597 : 28 Cr. L. J. 683 : A. I. R. 1927 O. 259 : 103 I. C. 411.

sufficient if in laying down the law for the guidance of the Jury, the Judge informs the Jury what facts must be found by them before they can bring in a verdict of guilty, and it matters not whether the Judge tells the Jury that the offence consists of such and such elements or that such and such elements are necessary to constitute an offence; and assuming that there has been an omission to lay down the law fully to the Jury, the Court must be satisfied under S. 537 (d) that a failure of justice has been occasioned, before it can set aside a trial.³⁴² The omission of the Judge to lay down the law by which the Jury is to be guided is usually described as misdirection. But it is something more than that. It is a failure to comply with an express provision of the law and S. 537 is not applicable to such a case; omission to explain all the essential elements of the offence is fatal and vitiates the conviction.³⁴³ But insufficient explanation of law, though causing a possible miscarriage of justice, is not prejudicial when the conviction is of a minor offence.³⁴⁴ Nor would an omission to give a detailed definition of an offence vitiate a verdict or call for a reversal thereof, when it is clear that the nature of the offence has been described in detail to the Jury and its constituent factors have been understood by them; so, in a dacoity case, though the Judge did not give a full explanation of the provisions of the law under which the charge had been framed, yet as he had put before the Jury every fact necessary to establish the charge, it was held that there was no misdirection.³⁴⁵ Where the Judge noted, "Ss. 419, 467 and 120B and other connected Sections, 415, 416, 463, 464 and 120A I. P. C., read and explained to the Jury": *Held*, that the mere fact that the charge to the Jury did not disclose how the Judge had explained the Section to them was not a ground for holding that the explanation of the Judge was not sufficient, especially where there was no difficulty about the Sections.³⁴⁶ A charge to the Jury must enable one to understand what the specific offence was with which the prisoner was charged.³⁴⁷ The law must be laid down fully and clearly, calling the attention of the Jury to the different elements constituting the offence in order to assist them in applying the law to the facts of the case.³⁴⁸ Mere reference to the Sections of the Penal Code defining the offences or merely reading those Sections is not a sufficient exposition of the law.³⁴⁹ It is the duty of the Judge to call the attention of the Jury to the facts and then leave it to them to consider whether from the facts they conclude that a particular act

342. *Briscoe Birch* (1909) 3 Bur. L. T. 69 : 11 Cr. L. J. 340 : 5 I. C. 981.

343. *Mari Valayan* (1906) 30 M. 44 : 5 Cr. L. J. 78 ; *Biru Mandal* (1897) 25 C. 561 ; *In re Suratti* (1910) 11 Cr. L. J. 222 : 6 I. C. 14 (M).

344. *Jaspath* (1886) 14 C. 164 ; *Krishna Dhan* (1894) 22 C. 377, 383.

345. *Jindar Singh* (1924) 1 O. W. N. 332 : 25 Cr. L. J. 1032 : A.I.R. 1925 O. 69 : 81 I.C. 838.

346. *Hanif* (1932) 34 Cr. L. J. 56 : A. I. R. 1932 C. 786 : 140 I. C. 723.

347. *Shubratee*, Cr. Lett. No. 1136, dated 21st Sep. 1867 : 8 W. R. Cr. Lett. 22.

348. *Taju Pramanik* (1898) 25 C. 711 : 2 C. W. N. 369 ; *Abbas Peada* (1898) 25 C. 736 : 2 C. W. N. 484 ; *Mohammad Israil* (1929) 1929 A. L. J. 1261 : 31 Cr. L. J. 33 : A. I. R. 1930 A. 24 : 120 I. C. 264 ; *Ramgopal* (1858) 10 W. R. 7 ; *Abaji Ramachandra* (1891) 16 B. 165 ; *Shyama Charan* (1905) I. C. L. J. 159 : 2 Cr. L. J. 157.

349. *Abbas Peada* (1898) 25 C. 736 : 2 C. W. N. 484 ; *Sri Prosad* (1899) 4 C. W. N. 193 ; *Arumuga* (1933) 1933 M. W. N. 320.

was done and if they so conclude then to direct them that the case comes within a particular Section of the Code.³⁵⁰

It is the duty of the Judge to tell the Jury how to apply the law to the facts found by them ; the charge should shortly state the salient points in the case, and should not be delivered in such a way as to have the effect of confusing the Jury as to the way in which the law should be applied to the case.³⁵¹ Where the Sessions Judge, both before and after summing up the evidence, placed certain questions of fact before the Jury and directed them that, if they found certain facts proved, they were to convict, and that, if on the contrary they found certain other facts proved, they were to acquit : *Held*, that there was no laying down of the law as required by S. 297, that the essential elements of the offence with which the accused was charged ought to have been explained and that there was grave misdirection which would not be cured by S. 537.³⁵² In laying down the law the Judge should adhere to the words of the particular Section of the Penal Code,³⁵³ with which he has to deal, and not substitute phraseology of his own ; e. g., "*defacto* legal guardian" for "lawfully entrusted" in S. 361 of the Penal Code.³⁵⁴ It is necessary for a Judge to read the very words of the Section itself to the Jury if he purports to give them what are the provisions of the Section; and then, if necessary, to explain what is the meaning of the Section.³⁵⁵ Where the accused were charged with having committed a number of offences which are of a complex character viz., Ss. 395, 380/149, 147 and 143 I. P. C., it was very necessary that the Judge should have explained to the Jury what the elements are which go to constitute each of those offences, and should have clearly placed before them the distinction between them ; simply reading of the charges unaccompanied by any explanation of the law was not sufficient.³⁵⁶ The Judge should not say :—"The law bearing on the case has been placed before you more than once in the addresses delivered by the learned pleaders on either side. I need not go into detail, therefore." *Held* that it is immaterial how much or how often the Jury were addressed by the pleaders on both sides on the law ; the responsibility of laying down the law for the guidance of the Jury is on the Judge.³⁵⁷ A charge is defective if it states that the law on the subject has been already presented to the Jury by the Public Prosecutor and that, in the opinion of the Judge, no difficult point of law arises in the case.³⁵⁸ In complicated cases he should not only explain the law but note the evidence and explain how the Jury should apply the law to the particulars, indicating the points to be considered.³⁵⁹ Where there are several accused persons the Judge should

350. Sri Prosad (1899) 4 C. W. N. 193.

351. Jabanullah (1929) 57 C. 1162 : 34 C. W. N. 365 : 32 Cr. L. J. 111 : A. I. R. 1930 C. 434 : 128 I. C. 254.

352. Po Set (1910) 11 Cr. L. J. 345 : 5 I. C. 988.

353. In re Venkatigadu (1926) 27 Cr. L. J. 1191 : A. I. R. 1926 M. 1121 : 97 I. C. 951.

354. Nakul (1909) 13 C. W. N. 754 : 11 Cr. L. J. 9 : 4 I. C. 543.

355. Durga Charan (1922) 26 C. W. N. 1002 : 36

C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922 C. 124 : 68 I. C. 407.

356. Biru Mandal (1897) 25 C. 561 ; Tomij (1897) 1 C. W. N. 301 ; Mari Valayan (1906) 30 M. 44 : 5 Cr. L. J. 78 ; Kasimuddin (1920) 47 C. 795, 797 : 21 Cr. L. J. 694 : 57 I. C. 934 ; Babya (1899) 1 Bom. L. R. 784.

357. Mangan (1902) 29 C. 379 : 6 C. W. N. 292.

358. Ramprasad (1924) 26 Cr. L. J. 1090 : A. I. R. 1926 N. 53 : 88 I. C. 178.

direct the Jury to discriminate between the offences committed by the several accused persons and to return a verdict as to the exact guilt of each; *e.g.*, whether all exceeded the right of private defence³⁶⁰; or all acted in pursuance of a common object³⁶¹; or of what offences the different accused should be convicted for the use of the different weapons by them.³⁶²

The Judge is not bound to explain the law on points not arising on the facts or the pleadings.³⁶³ In a trial for culpable homicide, it is not an appropriate mode of laying down the law to discourse on all branches and departments of the complicated topic of crime; to do so would confuse the Jury and would direct their deliberations into channels that have nothing to do with the case. The duty of the Judge is to lay down the law in reference to the case presented to the Court and the facts of the case and not to perplex the minds of the Jury with considerations that are outside the legitimate scope of the enquiry. It is the duty of the Judge to keep the Jury within proper limits, and, for this purpose to simplify, so far as he can, the issues fairly and properly before the Court and direct the minds of the jurors to those issues and those issues only.³⁶⁴ In a trial by Jury it is quite unnecessary to explain to the Jury or to lecture the Jury upon abstract principles of law or abstract theories of proof. The Judge's duty is to apply these principles and theories to concrete instances which arise in trials. The Judge in the record of his charge stated as follows: " 'Proved' defined and 'reasonable doubt' explained; S. 3 of the Evidence Act", It was quite unnecessary for the Judge to read out or explain definitions of words used in the various Codes to the Jury. Instead of explaining to the Jury the theoretic principles of proof, it is his duty to deal with specific pieces of evidence, and facts given in evidence and tell the Jury whether or not they are evidence which the Jury must consider in that particular case. Although the Judge need not explain to the Jury abstract principles of law, he must explain those particular Sections of the Penal Code which applied to the particular case which the Jury are trying, and he ought to set out in the copy of the charge which is sent up with the record his explanation in sufficient detail to enable the High Court to ascertain whether he has properly explained the law about the offence, with which the accused are charged, to the Jury.³⁶⁵

Omission to give proper direction to the Jury on a point of law arising out of the nature of the defence in the case, vitiates the verdict, and the High Court in its discretion can acquit the accused instead of ordering a retrial.³⁶⁶

359. Rupan Singh (1925) 4 P. 626, 646 : 27 Cr. L. J. 49 : A. I. R. 1925 P. 797 : 91 I. C. 225 ; Abdul Rahim (1925) 41 C. L. J. 474, 479 : 26 Cr. L. J. 1279 : A. I. R. 1925 C. 926 : 88 I. C. 1055.

360. Baij Nath (1908) 36 C. 296, 299, 300 : 13 C. W. N. 677 : 9 Cr. L. J. 443 : 1 I. C. 973.

361. *In re Komali* (1886) 1 Weir 450 ; Dakhani (1932) 55 A. 68 : 34 Cr. L. J. 441 : A. I. R. 1933 A. 128 : 142 I. C. 800.

362. Babya (1899) 1 Bom. L. R. 784.

363. Adam Ali (1926) 31 C. W. N. 314 : 45 C. L. J.

131 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718.

364. Upendra (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113, Per Jenkins, C. J ; *see also* the observations of Mookerjee J., in the same case noted *ante*. *See also* Nobokisto (1867) 8 W. R. 87.

365. Garibulla (1933) 37 C. W. N. 1131 : 34 Cr. L. J. 1231 : A. I. R. 1933 C. 722 ; 146 I. C. 237.

366. Abdul Rahim (1921) 25 C. W. N. 623 : 33 C. L. J. 340 : 22 Cr. L. J. 606 : 62 I. C. 878.

Where a Jury informs a Judge that the law in a particular matter calling for a decision from them is not understood, it is clearly the duty of the Judge to explain it to them.³⁶⁷

12. Discussions on questions of law—References to Judicial decisions, Treatises and Text-books.—

It is inadvisable to take as an aid in construing an Act the proceeding in the Legislative Council which resulted in the passing of the Act, and therefore the Judge is not permitted in his summing up, nor should he permit Counsel in the course of his address, to refer to such proceeding. In *Q. E. v. Bal Gangadhar Tilak*³⁶⁸ Mr. Pugh, Counsel for the prisoner, when addressing the Jury referred to the speech of the Legal Member of the Indian Legislative Council when proposing the enactment contained in S. 124 A. I. P. C. and contended on certain authorities that the speech might be so referred to. Strachey, J. relying on *Administrator-General of Bengal v. Prem Lal*³⁶⁹ and also considering the question apart from authority, held, that was not permissible; but said:—"Mr. Pugh can of course read any passages from Sir James Stephen's speech as a part of his address and as stating his own arguments in words which he adopts as his own, but he can not cite them as Sir James Stephen's opinion or as authority showing the construction to be put upon the Section,

Well-known treatises, such as Taylor's Medical Jurisprudence, may be referred to in the course of the trial.³⁷⁰

Jury should take the law from the Judge; and therefore, when cases have been cited to the Judge in a legal argument and he has given an opinion on them, they are not allowed to be read to the Jury in the address of the prisoner's Counsel to them.³⁷¹ A Judge should not discuss points of law in summing up to the Jury and he should avoid all extraneous and unnecessary arguments, merely summing up the evidence and showing how the law applies to it. Macpherson, J. said:—"The Judge's charge to the Jury is of extraordinary length and discusses many questions with which the Jury has nothing to do and which it ought to have been the object of the Judge to keep from the Jury as far as it was possible. The first part of the charge argues and disposes of certain legal objections which had been raised by the prisoner's Counsel. With these objections the Jury had nothing whatever to do. All that the Judge had a right to do was simply to state how the law stood and to sum up the evidence on both sides. * * * It is all important that Judges in charging Juries should avoid all extraneous and unnecessary discussion and arguments and should confine themselves as directed by the Code to a mere summing up of the evidence on both sides, showing how the law applies to it. Discussion and arguments, however careful and learned, as to what the law is, invariably tend to confuse and mislead the Jury." In the same case Seton-Karr, J. observed:—"It is irregular for the Judge to discuss in his charge to the Jury the various points of law, some of them minute and difficult,

367. *Palavesa Tevan* (1911) 1 M. W. N. 190 : 12 Cr. L. J. 140 : 9 I. C. 788.

368. (1897) 22 B. 112.

369. 22 I. A. 107 : 22 C. 788.

370. *Hatim* (1882) 12 C. L. R. 86; *Hurry Churn* (1883) 10 C. 140 : 13 C. L. R. 358.

371. *Parish* (1837) 7 C & P. 782; 8 C. & P. 94.

which were raised by the prisoner's Counsel, and this introduction into the charge of matters foreign to it was only calculated to puzzle and mislead the Jury."³⁷² The duty of a Judge in charging a Jury in a criminal case is to make up his mind as to what the law is and to tell the Jury what it is, as succinctly and clearly as he can ; but to cite to the Jury a large number of cases which the Jury cannot possibly understand is calculated to confuse them and to lead to a miscarriage of justice.³⁷³ In explaining the law to the Jury, the Judge should state to the Jury what offence is proved by the facts of the case if they believe those facts and it is then for the Jury to say whether, within the definition given by the Judge, the facts as proved constitute the offence ; he should not leave the Penal Code to the Jury for them to read and interpret it for themselves.³⁷⁴ A Judge will in most cases be wise to refer to the exact terms of the law and then instruct the Jury with regard to its application to the facts before them, instead of adopting as principles passages from text-books (however eminent the writer may be) which briefly refer to what is laid down (or is supposed to be laid down) in reported cases, even to passages from the judgments of the reported cases themselves, which may mislead by not being correctly understood in relation to the facts of the particular case, or possibly by not containing an accurate exposition of the law.³⁷⁵ It is the duty of the Judge to tell the Jury how to apply the law to the facts found by them ; he would be failing in the proper discharge of his duty if he merely places the proper facts before the Jury without telling them how they should decide the guilt or otherwise of the accused on the law. It is often useful to illustrate the meaning of a legal doctrine by relevant examples culled from the books or stated by the Judge in his own words, but the practice of reading out head-note or other portions of a case not before them to the Jury is a dangerous practice which is to be discouraged as more likely to mystify than enlighten the jurors.³⁷⁶ The Judge should not cite a large number of rulings or deliver charges of inordinate length and involved nature.³⁷⁷ No rulings or authorities should be cited in the charge, nor should they be asked to differentiate or form any opinion whatever on any authority ; such procedure confuses the minds of the Jury and constitutes misdirection ; he should tell them what the law is after consulting the authorities himself.³⁷⁸ He should not read to them expositions of the Court of England or English Cases on the point contained in the text-books, as they can only serve to confuse the Jury and distract their attention from the points which they have to deal with.³⁷⁹ Reading a law report is not legally prohibited, but it is undesirable ; though in explaining the dividing line between Ss. 302 and 304 I. P. C. the Judge may properly do so.³⁸⁰ If the Jury do not understand the law fully and clearly it ought

372. Notokisto (1867) 8 W. R. 87.

373. Shyama Charan (1905) 1 C. L. J. 159 : 2 Cr. L. J. 157.

374. Jaspath (1886) 14 C. 164. See also Abaji (1891) 16 B. 165, 171 ; Bal Gangadhar (1897) 22 B. 112, 132 ; Shumshere (1868) 9 W. R. 51 ; In re Jhubboo (1882) 8 C. 739.

375. Smither (1902) 26 M. 1 : 2 Weir 521.

376. Jabanullah (1929) 57 C. 1162 : 34 C. W. N.

365 : 32 Cr. L. J. 111 : A. I. R. 1930 C. 434 : 128 I. C. 254.

377. Shyama Charan (1905) 1 C. L. J. 159 : 2 Cr. L. J. 157.

378. Meher Sardar (1911) 16 C. W. N. 46 : 13 Cr. L. J. 26 : 13 I. C. 218.

379. Abdul Rahim (1921) 25 C. W. N. 623 : 33 C. L. J. 340 : 22 Cr. L. J. 606 : 62 I. C. 878.

380. Nga Tin Gyi (1926) 4 R. 483, 494 (F. B.) :

to be explained afresh, but the Judge ought not to place before them Codes and legal treatises.³⁸¹ Judge explaining whole Section to the Jury need not point out to them the several stages of the argument or reasoning to enable them to come to a decision.³⁸² Proposed amendments of the law when they have not become part of the law ought not to be referred to in a charge to the Jury.³⁸³ The Jury may have the Sections in their hands while the Judge explains them.³⁸⁴ The Jury are not entitled to resort to a commentary on law during their consultation of their verdict; the Jury should take the law from the Judge, and when cases have been cited to the Judge in a legal argument and he has given an opinion on them, they are not allowed to be read to the Jury in the address of Counsel.³⁸⁵ In this case it was pointed out that in a civil case where a Jury had been allowed to take away with them an Act of Parliament, that circumstance was treated by Lord Lyndhurst as favouring the view that the Jury had mistaken the law and a new trial was ordered.³⁸⁶

13. Judge to decide on the relevancy or otherwise of the Evidence.—

Matters which have not been proved in evidence should not be referred to by the Judge in his charge to the Jury; so also, such matters, nor matters which are not proposed to be proved, should be allowed to be brought to the notice of the Jury by Counsel on either side. In England there was a conflict of authority on the question whether prisoner's Counsel was entitled to place before the Jury matters about which they have been instructed but which were not intended to be proved.³⁸⁷ This conflict was settled by the following Resolution of the Judges dated 26th November 1881: "In the opinion of the Judges it is contrary to the administration and practice of the Criminal law as hitherto allowed, that Counsel for the prisoners should state to the Jury as alleged existing facts matters which they have been told in their instructions on the authority of the prisoner, but which they do not propose to prove in evidence."³⁸⁸

An important decision as regards the duty of the Judge to exclude inadmissible evidence is *R. v. Gibson*.³⁸⁹ In that case Lord Coleridge said,—“It is the duty of the Judge in criminal trials to take care that the verdict of the Jury is not founded upon any evidence except that which the law allows.” Pollock, B. said:—“In the present case I am clearly of opinion that this Court has no power to say that the evidence of the identification of the prisoner was sufficient to warrant a conviction, without the statement of the woman who was passing at the time the offence was committed. The result would follow that in every case

28 Cr. L. J. 213; A. I. R. 1927 R. 68: 99 I. C. 1013.

381. *Wilson* (1926) 30 C. W. N. 693: 43 C. L. J. 537: 27 Cr. L. J. 926; A. I. R. 1926 C. 895: 96 I. C. 270.

382. *Jalaluddin* (1930) 31 Cr. L. J. 1092; A. I. R. 1930 C. 433: 126 I. C. 762.

383. *Abdul Gahur* (1922) 26 C. W. N. 972: 36 C. L. J. 152: 24 Cr. L. J. 76; A. I. R. 1922 C. 505: 71 I. C. 124.

384. *Jogendra* (1891) 19 C. 35, 42; *Bal Gangadhar* (1897) 22 B. 112, 129.

385. *Bharmia* (1895) Rat. 736: 6 Bom. L. R. 258: 1 Cr. L. J. 265.

386. *Ibid* [referring to *Gregory v. Tuffs* (1833) 6 C & P. 271.

387. *Butcher* (1839) 2 M. & Rob. 228; *Beard* (1837) 8 C. & P. 132; *Weston* (1879) 14 Cox 346.

388. *Shimmin* (1882) 15 Cox 122.

389. (1887) 18 Q. B. D. 537: 15 Cox C. C. 181.

where inadmissible evidence has been received it would become the office of the Court to decide in what way the Jury ought to have acted on the evidence before them which was legally admissible." Mathew, J. said :—"We have to lay down a rule which shall apply equally where the prisoner is defended by Counsel and where he is not. In either case it is the duty of the Judge to warn the Jury not to act upon evidence which is not legal evidence against the prisoner." Wills, J. said :—"If a mistake has been made by Counsel, that would not relieve the Judge from the duty to see that proper evidence only was before the Jury. It is sometimes said, erroneously as I think, that the Judge should be Counsel for the prisoner³⁹⁰ ; but, at least, he must take care that the prisoner is not convicted on any but legal evidence."

In cases tried by a Jury it is the duty of the Judge to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties.³⁹¹ 'It is the duty of the Judge to stop inadmissible questions put in cross-examination, and if they have been put, to caution the Jury carefully against their inference'; this was said of the accused's examination.³⁹² The Court may and in a proper case should give effect to a point of law which might have been taken for the defence at the trial.³⁹³ When the prisoner is undefended it is peculiarly the duty of the Court of trial to protect his interests.³⁹⁴ When the evidence is being given the Judge should be vigilant to let in only such evidence as is relevant, and the moment a witness commences to give evidence which is inadmissible he should be stopped.³⁹⁵ When considering the question of admissibility, the Court should always lean in favor of the accused and exclude all evidence tendered by the prosecution which is of doubtful or remote relevance.³⁹⁶ If improper questions have been admitted at the trial, it is for the Crown to see that their improper effect has been set right by the Court ; either the Jury should be told at once to disregard the statement or else the charge should contain a similar warning to them ; if the Judge be of opinion that it would be difficult for the Jury to do so and the evidence is material, it is preferable that there should be a new trial.³⁹⁷ Where a statement, inadmissible in evidence, is brought to the notice of the Jury, an omission by the Judge to refer to it in his charge to the Jury is a misdirection.³⁹⁸ Where evidence, very prejudicial against the accused, had been wrongly admitted and the Judge in his

390. In Archbold's Criminal Pleading, Evidence and Practice, 1927 Ed. P. 177 it is said :—"Quite apart from Statute and the practice of the Superior Courts, where the prisoner is not defended by Counsel, the Court may request some member of the Bar present to give his honorary services to the prisoner, if the prisoner is willing to accept them. R. V. Fogarty, 5 Cox 161 (Ir.) ; R. V. Yscuado. 6 Cox 386. This course has hitherto been adopted only in case of murder or other grave crime or where the circumstances of the case are special. In R. V. Gillingham, 5 Cr. A. R. 187, the Court of Criminal Appeal considered that in case of rape or offences of a similar nature

the Judge at the trial should endeavour to see that the defendant is defended by Counsel."

391. Abbas Peada (1898) 25 C. 736 : 2 C. W. N. 484.

392. Ellis (1910) 5 Cr. A. R. 41.

393. Wilks (1914) 10 Cr. A. R. 16.

394. Doubleday (1917) 12 Cr. A. R. 240.

395. Pittambar (1867) 7 W. R. 25.

396. Benoyendra (1936) 40 C. W. N. 432 : 37 Cr. L. J. 394 : A. I. R. 1936. C. 73 : 161 I. C. 74.

397. Kurubuddin (1925) 28 Bom. L. R. 281 : 27 Cr. L. J. 481 : A. I. R. 1926 B. 238 : 93 I. C. 881.

398. Sumeshwar Jha (1921) 23 Cr. L. J. 91 : A. I. R. 1923 P. 103 : 65 I. C. 443.

charge to the Jury asked them to put that evidence out of their minds entirely and to discard it altogether, but the High Court was not sure that the evidence did not effect the minds of the Jury, the verdict was set aside.³⁹⁹

Hearsay evidence is not to be admitted ; if hearsay evidence or evidence of character which is inadmissible is let in, the Sessions Judge should point out in his summing up that that was no proper evidence and that the Jury in coming to their verdict must shut it out of their minds ; if this is done, the admission alone may not form a ground of new trial.⁴⁰⁰ Evidence of a person stating before the Jury upon oath facts which he does not know as his own observation, facts which constitute the substance of the charge against the prisoner and which the Jury themselves have to inquire into and arrive at their verdict, ought not to be allowed to go to the Jury.⁴⁰¹

A person who prepares a map in a criminal case ought not to put upon it anything more than he himself sees. Particulars derived from witnesses examined on the spot should be noted not on the body of the map but on a separate sheet of paper, annexed to the map as an index thereto, the spots being marked as a, b, c, d etc. ; and where this rule is not followed the Jury may be misled.⁴⁰²

A Sessions Judge should not allow the Magistrate who recorded the confession to give evidence that a confession had been made by the accused, before deciding the question whether it ought to be admitted or not. It is no good telling the Jury first that the accused has made a confession and then sending them out of Court while the question is discussed whether the confession ought to be admitted or not. A great deal of damage is already done by the mere statement that the accused has confessed. The words of the confession, if excluded, are not brought to the attention of the Jury, but nevertheless they hear that something in the way of a confession has been made and that for some reason or other the Judge has ordered it to be excluded from evidence.⁴⁰³

Matters which have not been proved against the accused but are mere matters of prejudice should not be placed before the Jury. In a case for bringing a false charge the Sessions Judge in his summing up had made a remark that from the evidence of the complainant it appeared that this was the third false charge which the prisoner had brought against him : *Held*, that if the previous charges were *proved* to be false the matter might be dwelt on as a ground for additional penalty, but if they were not proved then the Judge was wrong in dwelling on the circumstances simply as of a charge having been brought to the prejudice of

399. Ramesh (1919) 46 C. 895 : 23 C. W. N. 661 : 29 C. L. J. 513 : 20 Cr. L. J. 324 : 50 I. C. 660.

400. Pittambur (1867) 7 W. R. 25 ; Mohima (1871) 6 B. L. R. Cr. App. 108.

401. Ramgopaul (1868) 10 W. R. 57.

402. Abinash (1924) 52 C. 172 : 28 C. W. N. 995 : 26 Cr. L. J. 350 : A. I. R. 1924 C. 1029 : 84

I. C. 654 ; Bhagirathi (1925) 30 C. W. N. 142 : 27 Cr. L. J. 222 : A. I. R. 1926 C. 550 : 92 I. C. 174 ; Mofizel Peada (1925) 29 C. W. N. 842 : 26 Cr. L. J. 1298 : A. I. R. 1925. C. 909 : 89 I. C. 242.

403. Daud Shaikh (1935) 40 C. W. N. 159 : 62 C. L. J. 257.

the accused.⁴⁰⁴ In a prosecution for giving false evidence under S. 193 I. P. C. and for false verification, if documents which were tendered in the Civil Suit are relied upon, they must be proved in the trial, unless they are admitted in the trial itself or in the Court of the Committing Magistrate, in which case such admission may be taken as evidence.⁴⁰⁵ Statements recorded by the police⁴⁰⁶ or statements purported to have been taken down under S. 364 Cr. P. C. but which have not been admitted in evidence,⁴⁰⁷ cannot be treated as evidence and placed before the Jury. When a document is to be used against a prisoner, connection with which he does not admit, care should be taken that it has been legally proved. Where a written statement alleged to have been filed by the prisoner had not been so proved, if the Judge drew the attention of the Jury to the document at all he should have pointed out to them, in the first place, that there was nothing to show that it was signed by the prisoner; and in the second place, that it was not proved that it was signed by anybody on his behalf or at his desire. An erroneous omission to object in the lower Court does not make inadmissible evidence relevant.⁴⁰⁸ During the course of a police investigation into a complaint of theft the house of the accused was searched and a bundle of papers, about 58 in number, were found which were alleged to be forgeries or preparation for forgeries. The accused was thereupon committed to the Court of Sessions on a charge under S. 475 I. P. C. A few days before the trial of the accused, the Police searched the house of one S, who was a witness for the defence, and discovered a batch of suspicious papers which were produced at the trial and put in as evidence against the accused. The Judge directed the Jury on these papers as follows:—"I must next call the Jury's attention to the bundle of papers found on the 28th April last in the house of S. It is not pretended that they were found in the possession of the accused, but it is urged that they establish a connection between the accused and many of his witnesses belonging to the same faction and that they show the extent to which the practice of forgery has gone in the village of M, and that in this way they are relevant to the question of guilty knowledge and intention. I feel it impossible to shut out evidence to this branch of the case, as it seemed to me of the utmost importance, in connection with the accused's guilt or innocence, to ascertain the truth if possible. This has greatly lengthened and complicated the inquiry, but the case would have been incomplete had not this new discovery been fully investigated. These papers must be carefully examined by the Jury as some of them undoubtedly throw much light on the connection of the different parties concerned and on the case generally": *Held*, that the papers in question ought never to have been admitted in evidence and the Judge's direction was wrong.⁴⁰⁹ In a suit by A against the obligors of a bond the Court held, for reasons stated in his judgment, that the signatures of the obligors were not genuine and directed the prosecution of A on a charge of forgery. On the trial of A, the judgment was put in evidence on behalf of the prosecution and the Sessions Judge in his

404. Basoodeb, Cr. Letter No. 1060, dated 10th September 1867 : 8 W. R. Cr. Lett. 21.

405. Kartick (1868) 9 W. R. 58.

406. Roghuni Singh (1882) 9 C. 455 : 11 C. L. R. 569.

407. O' Hara (1890) 17 C. 642.

408. Millar v. Madho (1896) 23 I. A. 106 : 19 A. 73. See also Narhari v. Ambabai (1919) 44 B. 192 ; Luchiram v. Radha (1921) 49 C. 93.

409. Abaji (1890) 15 B. 189.

summing up drew the attention of the Jury to the judgment and the Munsif's opinion contained in it, but at the same time said,—“You are not in any way bound by the opinion of the Munsif”; and later on drew the attention of the Jury to the fact that in the Civil suit the *onus probandi* was on the prisoner, whereas at the trial of the charge of forgery, the *onus* is on the prosecution: *Held*, that in as much as neither the judgment nor the Munsif's opinion was evidence, the Judge, if he referred to them at all, ought to have told the Jury not merely that they were not bound by them but that it was their duty to dismiss them altogether from their mind.⁴¹⁰ A prisoner had filed a petition of complaint against one N for an offence under S. 477 I. P. C. N was tried at the Court of Sessions for the said offence and at the trial the prisoner gave evidence. The prisoner was thereafter prosecuted and tried for giving false evidence. At the trial of the prisoner the petition of complaint was not regularly proved but the order on the back of it in the handwriting of the Deputy Magistrate and the statement of the prisoner taken under S. 342 Cr. P. C, were considered sufficient to prove it. *Held*, that a gap in the evidence for the prosecution cannot be filled up by any statement made by the accused under S. 342 Cr. P. C, and that it was a misdirection to ask the Jury to consider a document purporting to be proved by such a statement as evidence against the accused.⁴¹¹ But when the Judge in his charge to the Jury referred to a certain statement made by a person to other people, making it abundantly clear at the same time that although there was that statement sought to be brought in on the side of the prosecution, the person who made that statement had not been examined as a witness, and the Judge also gave the necessary warning to the Jury. *Held*, that there was no misdirection in the matter of bringing that statement to the notice of the Jury.⁴¹²

The previous statement of a witness, if it is not the deposition before the Committing Magistrate, is not evidence at all against the accused of the truth of the facts stated therein. So far as such prior statements are concerned the proper direction to be given to the Jury is that before relying on the evidence given by the witness at the trial, the Jury should take into consideration the fact that he made the previous statement, but that they must not treat the previous statement as being any evidence at all against the accused of the facts therein alleged. Apart from special cases, the unsworn statement of a witness, so far as the maker in his evidence does not confirm or repeat it, cannot be used against the accused at all as proof of the truth of what it asserts. This means not merely that it is in itself insufficient proof but that it cannot be so used at all. It cannot be coupled with probabilities which suggest that the witness was more likely to tell the truth on the former occasion than in the witness-box, so as to go to the Jury as part of the proof that what was then stated is true.⁴¹³ Statements in charge to the Jury, not borne out by the record, vitiate the charge.⁴¹⁴

410. Gogun Chunder (1880) 6 C. 247 : 7 C. L. R. 74.

411. Basanta (1898) 26 C. 49.

412. Enayet Ali (1933) 38 C. W. N. 446 : 36 Cr. L. J. 619 : A. I. R. 1934 C. 557 : 154 I. C. 981.

413. Profulla (1931) 58 C. 1404 (F. B.) : 35 C. W.

N. 731 : 53 C. L. J. 427 : 32 Cr. L. J. 768 : A. I. R. 1931 C. 401 : 131 I. C. 575.

414. Ramgopaul (1868) 10 W. R. 57 ; Isu Sheikh (1926) 31 C. W. N. 171 : 45 C. L. J. 584 : 28 Cr. L. J. 201 : A. I. R. 1927 C. 200 : 99 I. C. 937 ; Taribullah (1921) 25 C. W. N. 682 : 23 Cr. L. J. 244 : 66 I. C. 180.

Where, however, a document is not *per se* inadmissible, but is admitted without objection from the accused though not formally proved, the verdict cannot be set aside on that ground.⁴¹⁵

The Judge should not put before the Jury the result of an original trial to which the trial before him was supplementary, without qualifying the reference with an admonition.⁴¹⁶ The Jury are bound to form an independent opinion on the evidence before them. A Judge, therefore, should not, in charging the Jury, refer to a previous case against some other person tried for the same offence, except to warn the Jury that they are not to be influenced in any way by the result of such previous trial. It is a misdirection for him to tell the Jury that the High Court in the previous case had come to a certain finding on the question of possession and to warn them that they must consider carefully whether there was any reason for coming to a different conclusion on the point of possession. This misdirection, however, did not cause any failure of justice, in the particular case, because the defence taken was *alibi* and the accused never pleaded, must less discharged the *onus* of proving that their possession of the land on which the riot took place had been interfered with, and that they had acted in the exercise of the right of private defence; and so the High Court refused to interfere with the verdict.⁴¹⁷ A Court in which a second trial is held has nothing to do with the evidence given in the former trial, except for the purpose of ascertaining whether the offence in the two trials is the same; and the Sessions Judge would be right in charging the Jury as follows:—"That case (i.e. the previous case) was not before the Jury and they must be guided solely by the evidence in the case before them."⁴¹⁸ In a supplementary trial it is the duty of the Judge to warn the Jury that the accused must have a perfectly fair trial and that they are not to be biased by the result of the original trial and that it is neither necessary nor proper to tell the Jury about the offences of which the first batch of accused persons were convicted.⁴¹⁹ If previous proceedings concerning a prisoner or in connection with the occurrence for which the prisoner is being tried have necessarily to be referred to, they should be dealt with by the Judge in such a manner as to avoid the minds of the Jury being affected by them, and the Jury should be warned to pay no attention to the result of the previous proceedings.⁴²⁰ The reasons given by a Magistrate in discharging an accused and the contents of the order of the Sessions Judge directing further inquiry and commitment of the accused, that is to say, the opinions of these officers should not be placed before the Jury.⁴²¹ But in a case in which evidence of the result of the police inquiry was admitted, it was held, that that evidence was not wrongly admitted because it was given to

415. Ram Bhagwan (1918) 19 Cr. L. J. 886 : 47 I. C. 82 (P).

416. Pokhri, Cr. Letter dated 20th December 1864 : 1 W. R. Cr. Lett. 11.

417. Keshab (1909) 9 C. L. J. 380 : 10 Cr. L. J. 498 : 4 I. C. 120.

418. Musst. Itwarya (1874) 22 W. R. 14 : 14 B. L. R. 54 ; Bishonath (1869) 12 W. R. 3 : 3 B. L. R. 20.

419. Mofezuddi (1922) 24 Cr. L. J. 305 : 72 I. C. 65 (C).

420. Mouze Ali (1920) 31 C. L. J. 305 : 21 Cr. L. J. 554 : 56 I. C. 858 ; Mohabeer Singh (1866) 6 W. R. 64 : Hari Charan (1925) 27 Cr. L. J. 398 : A.I.R. 1926 C. 728 : 93 I. C. 46 (conviction of a co-accused in a previous trial).

421. Harendra (1910) 11 Cr. L. J. 538 : 7 I. C. 915 (C).

explain the delay in the institution of the case, the fact being that the accused was arrested only after, and in consequence of, the police inquiry.⁴²² A Sessions Judge tried two persons M and G with the aid of a Jury and the Jury found them guilty of having abetted the causing of grievous hurt to Z with a deadly weapon (Ss. 326 and 109 I. P. C.). As soon as this trial was over, Z was put on his trial charged with causing the death of D, causing grievous hurt to him, &c. The Jury was comprised of the same persons who had just tried the case of M and G, and the Judge treated as evidence in this second trial all the evidence taken at the former trial, and the same being bodily imported into it. The result was that the record of the case against Z, taken by itself, contained absolutely no evidence of the death of D or of grievous hurt to D caused or abetted by Z. The evidence treated in that way was used in the summing up. *Held* that the irregularity committed was patent and that a Judge had no right whatever to place before the Jury any evidence save that which had been legally put in, in the particular case under trial.⁴²³ In the trial of a prisoner on a charge of giving false evidence the Judge read to the Jury the remarks recorded by the Judge after receiving the verdict of the Jury and of the Jury in a former case,—being expressions of the Judge and the Jury—that the prisoner (now defendant) who had given evidence in that case, was in league with the prisoner who was in that case convicted of forgery. *Held*, that this was wholly irregular and that a reference in this manner to the proceedings in a former case must have tended to prejudice the minds of the Jury on the present occasion.⁴²⁴ It is a misdirection to tell the Jury that the decision of the Court in another case is relevant to the question before them; when, however, the evidence is very strong, the conviction need not be set aside on that ground.⁴²⁵

The mere fact that the Judge states to the Jury his impression of the demeanour of some of the witnesses does not amount to a misdirection, as the witnesses having appeared before the Jury they could also judge of it themselves.⁴²⁶

Evidence relating to proposals of compromise ought not to go in as evidence of guilty knowledge against the accused.⁴²⁷ Where J. had complained that she had been robbed of certain ornaments, dhan and bullocks, and M gave evidence in support of the complaint, and thereafter I and M were put on their trial together, (I for having lodged a false complaint and N for abetment thereof and also for giving false evidence), the Judge called the attention of the Jury to the testimony of certain witnesses as to what M had admitted before certain arbitrators; *Held*, that the statements were not admissible against J.⁴²⁸

Whether a communication is privileged or not is not a matter for the Jury's consideration at all; it is a point of law for the Judge to decide.⁴²⁹

422. Abdul Salim (1921) 49 C. 573 : 26 C. W. N. 680 : 35 C. L. J. 279 : 23 Cr. L. J. 657 : A. I. R. 1923 C. 107 : 69 I. C. 145.

423. Zoolfkar Khan (1871) 16 W. R. 36.

424. Shobrattee Sheikh (1866) 6 W. R. 2.

425. Aziz Khan (1932) 1932 M. W. N. 862.

426. Shamlal (1924) 26 Cr. L. J. 572 : A. I. R. 1925 C. 930 : 85 I. C. 716.

427. Abbas Peada (1898) 25 C. 736 : 2 C. W. N. 484.

428. In re Jugut Mohini (1881) 10 C. L. R. 4.

429. Chunder Kant (1868) 10 W. R. 14.

14. Judge to decide on Meaning and Construction of Documents.

Interpretation of a document is for the Judge and its application to a particular case is the function of the Jury. A Judge ought to explain to the Jury the legal effect of a document or a portion of it relied upon by the prosecution or the defence.⁴³⁰ He is entitled to draw the attention of the Jury to an alteration appearing on the face of the document.⁴³¹

15. Directions as to Onus of Proof.—

The burden of proof in a criminal trial remains at all times upon the prosecution and it is only shifted upon the accused, in so far as the accused person may set up the existence of circumstances bringing his case within any of the general exceptions of the Penal Code or within any special exception or proviso contained in any other part of the same Code.⁴³² The onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution, for the presumption of innocence is favoured in law; in other words, every man is presumed to be innocent until the contrary is proved.⁴³³ The Judge must instruct the Jury that the burden of proof of a criminal charge is on the prosecution: where a Judge in the beginning of his charge put to the Jury that the burden of proof is on the prosecution but later on put before them two hypotheses, one suggested by the prosecution and the other by the defence, and asked the Jury to decide which hypothesis suited the facts better: *Held*, that the charge is open to objection.⁴³⁴ When, however, the whole trend of the charge shows that the Judge warned the Jury that the burden of proof lay on the prosecution and they have to be satisfied whether the case has been established by the prosecution, the omission to mention in express terms that there is a presumption of innocence in favour of the accused persons, does not amount to misdirection.⁴³⁵ The proposition that "the fact that the accused has entered into no defence should not be considered against him as it is always incumbent on the prosecution to establish the guilt of the accused" is one which it is quite possible to understand too broadly. Frequently, the prosecution is able not to establish directly the guilt of the accused but to prove circumstances which, unless explained, leave no other conclusion than that he is the guilty person. In such a case, it lies on the accused person to afford that explanation. There may be other circumstances which are not so conclusive, but are equally consistent with the guilt or innocence of the accused; these alone will not put the burden on him.⁴³⁶ Where the accused had examined witnesses to establish their right of private defence and the Judge referred to S. 105 of the Evidence Act and made remarks which suggested that a higher standard

430. *Setul* (1865) 3 W. R. 69.

431. *Kissoree Mohun* (1872) 17 W. R. 58.

432. *Binda* (1934) 11 O. W. N. 1224 : 35 Cr. L. J. 1489 : A. I. R. 1934 O. 485 : 152 I. C. 85.

433. *Ahmed Ally* (1869) 11 W. R. 25 ; *Khorshed Kazi* (1881) 8 C. L. R. 542 ; *Haradhan* (1892) 19 C. 380 ; *Debi Singh* (1901) 28 C. 399 : 5 C. W. N. 413 ; *Panchanon* (1919) 23 C. W. N. 693 : 30 C. L. J. 19 : 20 Cr. L. J. 721 : 52 I. C. 881 ; *Hathim* (1920) 24 C. W. N. 619 : 31 C. L. J. 310 : 21 Cr. L. J. 545 :

56 I. C. 849 : *Srinivasa Ayengar* (1881) 4 M. 393 : 1 Weir 76 ; *Bala Krishna* (1893) 17 B. 573 ; *Musst. Kesar* (1918) 1919 P. 33 (F. B.) : 20 Cr. L. J. 161 : 49 I. C. 481.

434. *Abdul Gahur* (1922) 26 C. W. N. 972 : 36 C. L. J. 152 : 24 Cr. L. J. 76 : A. I. R. 1922 C. 505 : 71 I. C. 124.

435. *Aziz Khan* (1934) 36 Cr. L. J. 612 : A. I. R. 1935 A. 103 : 154 I. C. 1019.

436. *Ramrutton*, Cr. Lett. dated 22nd June 1867 : 8 W. R. Cr. Lett. 8.

of proof was required to be conformed to, to discharge the burden that lay on the accused ; *Held*, that the remark amounted to misdirection ; and it was said :—"The incidence of burden of proof means that the person on whom it lay must prove the fact ; but the meaning of 'proof' as defined in S. 3 of the Evidence Act is in no way affected by the incidence of burden of proof."⁴³⁷ Where the Judge in his charge to the Jury omitted to give any direction as to the onus of proof or that the accused were entitled to a reasonable doubt ; and it could not be said in the case, that properly directed, the Jury must have returned the same verdict ; *Held*, that there was a misdirection vitiating the trial.⁴³⁸ In this case Lord Atkin observed :—"Speaking generally, it has to be remembered that it is an essential principle of our criminal law that a criminal charge has got to be established beyond reasonable doubt and it is essential that the tribunal of fact should understand this. Unless the Judge makes sure that the Jury appreciate their duty in this respect his omission is as grave an error as active misdirection on the elements of the offence, and a verdict of guilty given by a Jury who have not taken this fundamental principle into account is given in a case where the essential forms of justice have been disregarded. In such a case unless it can be predicated that properly directed the Jury must have returned the same verdict, a substantial miscarriage of justice appears to be established. In the present case, it appears to their Lordships quite insufficient that a statement on this point should have been made by counsel for the defence. Jurors are apt to be suspicious of law as propounded by the defence. They look to the Judge for the authoritative statement of it ; and in the present case there appears to be no sufficient ground for supposing that the Jury had present to their minds the governing principle of our law as to onus of proof. Nor are their Lordships satisfied that in any case the Jury must have returned a verdict of guilty. It is true that there was evidence against the accused, but a close scrutiny of the evidence fails to satisfy them that upon a proper direction the Jury might not have reasonably come to the conclusion that the guilt of the accused was not established beyond a reasonable doubt". In a case of rape, even though the accused denies the whole story, it is the duty of the Judge to tell the Jury that the burden was on the prosecution to prove in addition to the factum of sexual intercourse that the girl was below 14 or else that the accused committed the act against her will or without her consent.⁴³⁹ Where the Judge did not clearly explain that the onus of proof was on the prosecution and did not set out all the points for decision and omitted to give proper directions on the facts of the case, it was held that this was a misdirection which vitiated the verdict.⁴⁴⁰

In a trial with a Jury the Chairman said :—"When a man is found in another man's house the duty is cast upon him of giving an account of how he came there, and it is for you to say whether his statement sounds like an honest statement or whether it is a dishonest statement made upon the spur of the moment when he is caught." *Held*, by the Court of

437. Mahommed Yunus (1922) 50 C. 318 : 25 Cr. L. J. 467 : A. I. R. 1923 C. 517 : 77 I. C. 819.

438. Lawrence (1933) 1933 A. L. J. 1025 (P. C.) : 34 Cr. L. J. 886 : A. I. R. 1933 P. C. 218 : 145 I. C. 209.

439. Abdul Khaleque (1933) 37 C. W. N. 484 : 34 Cr. L. J. 1161 : A. I. R. 1933 C. 606 : 145 I. C. 923.

440. Abdul Gahur (1922) 26 C. W. N. 972 : 36 Cr. L. J. 152 : 24 Cr. L. J. 76 : A. I. R. 1922 C. 505 : 71 I. C. 124.

Appeal that if this were a statement or direction of law as to the onus of proof it was incorrect. But the Court did not so regard the passage. They considered that it was merely a statement of common sense as to what we would expect of a man found in the particular circumstances of the case, under which the Jury would probably infer that the prisoner's intention was to commit felony unless he satisfied them to the contrary.⁴⁴¹

A recent decision of the House of Lords on the question of onus of proof is the following. The appellant was charged with the murder of his wife and put forward the defence that the killing had been due to an accident. The summing up contained the following passage :—"If the Crown satisfy you that this woman died at the prisoner's hands, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime, so that it is only manslaughter, or which excuse the homicide altogether by showing that it was a pure accident." *Held*, by the House of Lords, reversing the decision of the Court of Appeal, that the above statement amounted to a misdirection on the burden of proof. The burden of establishing his defence rests on the prisoner only when the defence is one of insanity and in certain cases specifically provided for in the statute. There is no principle of law that once the killing has been proved, circumstances of accident must be proved by the prisoner unless they arise out of the evidence produced against him. On a charge of murder the Crown must prove that the death occurred as the result of voluntary act on the part of the prisoner and malice, express or implied, on the part of the prisoner ; but if, at the end of the whole case, there is a reasonable doubt created by the evidence given either by the Crown or the prisoner, whether the prisoner killed the deceased with a malicious intention, the Crown have not made out their case and the prisoner is entitled to an acquittal.⁴⁴²

Referring to the above decision, in a case⁴⁴³ in which the Judge repeatedly drawn the attention of the Jury to the fact that the accused had failed to give an explanation of the facts adduced in evidence against him, it was held *per* Lord-Williams, J. that as the onus of proof in criminal cases never shifts to the accused, and they are under no obligation to prove their innocence or adduce evidence in their defence or to make any statement, the Judge's remarks amounted to misdirection, and that if the Judge intended to make such remarks, it was undoubtedly his duty first to give the accused an opportunity of explanation by drawing their attention specifically to the evidence upon which the Judge relied. In a same case Nasimali, J. observed that it is true that the proof of a case against the prisoner must depend for its support not upon the absence of any explanation on the part of the prisoner himself but upon the positive affirmative evidence of his guilt that is given by the Crown ; but it is not, however, an unreasonable thing and it daily occurs in investigations, both civil and criminal, that if there is a certain appearance made out against a party, if he is involved by the evidence

441. Wood (1911) 7 Cr. A. R. 56 : 76 J. P. 103
C. C. A.

ting on and doubting Greenacre (1837) 8 C. &
P. 35]

442. Woolmington (1935) 25 Cr. A. R. 72 [commen-

443. Benoyendra (1936) 40 C. W. N. 432 : 37 Cr.
L. J. 394 : A. I. R. 1936 C. 73 : 161 I. C. 74.

in a state of considerable suspicion, he is called upon for his own sake and his own safety to state and to bring forward the circumstances, whatever they may be, which might reconcile such suspicious circumstances with perfect innocence.

16. Directions on Benefit of the Doubt.—

In criminal cases there is always a result open to the Jury which is practically looked upon as merely negative, *viz.*, that which declares the accused to be not guilty of the crime with which he is charged. In cases of doubt, it is to this view that the Juries are taught to lean.⁴⁴⁴

The Judge is bound to tell the Jury that the accused could rely on the prosecution evidence so far as it helped them and that they are entitled to the benefit of the doubt.⁴⁴⁵ In every case it is well to include a direction that the prisoner must always be given the benefit of the doubt;⁴⁴⁶ and it is a customary caution to give the Jury to tell them that if they feel any doubt whether the prosecution or the defence version is true they should acquit the prisoner.⁴⁴⁷ The doctrine of reasonable doubt may be conveyed to the Jury in any adequate language.⁴⁴⁸ In some case it has been held that omission to caution the Jury to give the accused the benefit of a reasonable doubt amounts to misdirection;⁴⁴⁹ especially in cases in which the evidence for the prosecution is not overwhelming,⁴⁵⁰ or where the evidence is equally balanced;⁴⁵¹ or is of a doubtful character.⁴⁵² But in other cases it has been held that such omission is not necessarily a misdirection and does not always render a conviction invalid;⁴⁵³ though, as a matter of practice, it is well always to charge with these words.⁴⁵⁴ It is a usual and most proper direction for the Judge to instruct the Jury that if they entertain a reasonable doubt as to the guilt of any one of the accused the Jury should give him the benefit of the doubt and acquit him, and that it ought, as a matter of practice, to be given in every case, though the omission to give it may not, in every case, constitute a misdirection of such a character as to render a conviction invalid. Where, in regard to one of the accused, the Judge, after summing up the evidence, observed;—"There only seem to be some vague suggestions that he might have been concerned in the offence; when we scrutinise the evidence it seems very weak and, for the reason I have pointed out to you, it seems to be wholly inconclusive." *Held*, with regard to that accused, that the omission to give a direction as to

444. Roscoe's Criminal Evidence, 15th Edn., P. 18.

445. Asfar Sheikh (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52.

446. Sonia Koshti (1926) 28 Cr. L. J. 177 : A. I. R. 1927 N. 117 : 99 I. C. 849.

447. Dhiraji (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.

448. Sykes (1913) 8 Cr. A. R. 233.

449. Panchu Doss (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

450. Jagmohan (1919) 52 A. 207 : 1930 A. L. J. 486 : 30 Cr. L. J. 1146 : A. I. R. 1930 A. 28 : 120 I. C. 114.

451. Dhiraji (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385 ; Jagmohan (1929) 52 A. 207 : 1930 A. L. J. 486 : 30 Cr. L. J. 1146 : A. I. R. 1930 A. 28 : 120 I. C. 114.

452. Asraf Ali (1933) 37 C. W. N. 595 : 34 Cr. L. J. 533 : A. I. R. 1933 C. 426 : 143 I. C. 173.

453. Sonia Koshti (1926) 28 Cr. L. J. 177 : A. I. R. 1927 N. 117 : 99 I. C. 849 ; Rahimbeg (1924) 7 N. L. J. 208 : 27 Cr. L. J. 217 : A. I. R. 1925 N. 154 : 92 I. C. 169.

454. Rahimbeg (1924) 7 N. L. J. 208 : 27 Cr. L. J. 217 : A. I. R. 1925 N. 154 : 92 I. C. 169.

the benefit of the doubt amounted to a misdirection which prejudiced the accused and he must therefore be acquitted.⁴⁵⁵ Where the Judge omitted in his charge to the Jury any direction as to the onus of proof or that the accused was entitled to a reasonable doubt, and it could not be said in the case that properly directed the Jury must have returned the same verdict; *Held*, that there was a misdirection vitiating the trial.⁴⁵⁶ The Judge told the Jury in reference to giving the benefit of doubt to the accused that "the great object for which you are empanelled is to find out whether you have such doubts (*i.e.*, reasonable doubts)": *Held*, that this is not a very accurate statement of the position; the aim of a Jury trial is not a physiological examination of the mentality of the jurymen, it is concerned (in the words of the Privy Council) with 'the definite proof of a distinct offence', and the use of language tending to divert the attention of the Jury from the main issue to a subsidiary point is to be deprecated.⁴⁵⁷ The Judge must impress upon the Jury that if there is any doubt in their minds they must give the benefit of that to the accused.⁴⁵⁸ The direction about a reasonable doubt should appear at the end of the charge or in its appropriate place in the body of the charge; to conclude this head with an academic disquisition on the subject of proof is not only useless and a waste of time but will certainly have the effect of filling the minds of the Jury with confusion.⁴⁵⁹ Where a Sessions Judge in his charge, after summarizing the exposition of the law to the Jury, discussed the question of reasonable doubt when dealing with the law in the case, and again at the close of the charge he warned the Jury that "they are themselves to weigh the evidence and to come to findings on facts on their own judgments": *Held*, that there was no misdirection.⁴⁶⁰

17. Recording Heads of the Charge to the Jury.—

The proviso to S. 367 Cr. P. C. says that in trials by Jury the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the Jury. The Judge should not write a judgment merely, because it would be impossible to tell from it how the case had been left to the decision of the Jury,—which is the all important matter to be seen for the purpose of deciding whether the verdict should be upheld or not; so, even if he writes out a judgment he should record his heads of charge to the Jury.

Under S. 464, Act X of 1872, which provided that in trials by Jury heads of charge were to be recorded, it was held that the words must be construed reasonably and include such statements on the part of the Sessions Judge as will enable the Appellate Court to decide whether the evidence has been properly laid before the Jury or whether there has been any misdirection in the charge.⁴⁶¹ So it has also been held under the Code of 1882 that although under the law only heads of charge need be recorded, the Judge should give sufficient indi-

455. Para Thandan (1906) 4 Cr. L. J. 502. (M)

456. Lawrence (1933) 1933 A. L. J. 1025 (P. C.):
34 Cr. L. J. 886; A. I. R. 1933 P. C. 218;
145 I. C. 209.

457. Sachchidanand (1933) 14 P. L. T. 580; 34 Cr.
L. J. 892; A. I. R. 1933 P. 488; 144 I. C. 936.

458. Molla Khan (1933) 37 C. W. N. 1061 (S. B.):

35 Cr. L. J. 601; A. I. R. 1934 C. 169; 148
I. C. 172.

459. Asanulla (1935) 62 C. 911; 39 C. W. N. 924;
36 Cr. L. J. 1246; A. I. R. 1935 C. 534;
157 I. C. 837.

460. Watson (1935) 37 Cr. L. J. 17; 158 I. C. 172 (L).

461. Kasim Shaikh (1875) 23 W. R. 32.

cation in his charge that he has complied with the law, so as to enable the Appellate Court to form an opinion whether he has acted in accordance with the provisions of S. 297 or not.⁴⁶² All authorities are unanimous that the heads of charge must be sufficiently full and that the Court is under a duty to follow the procedure laid down in the statute and in the decisions of the High Courts.⁴⁶³

Charge to the Jury should be written in understandable English so that the High Court may be able to ascertain without puzzling themselves what was the meaning of the Judge which he intended to convey to the Jury ; further, the copy must be split up into sentences and paragraphs and properly punctuated to enable one to read it easily ; the Judge should also set down in his charge what he said to the Jury about the law.⁴⁶⁴ The Judge is not required to make a verbal transcript of his summing up ; it is only the heads of charge that he is required to record.⁴⁶⁵ It is always desirable to use the plainest and simplest language.⁴⁶⁶ The language should not be extravagant,⁴⁶⁷ nor involved in strong and colloquial expressions,⁴⁶⁸ but such as would present no difficulty in appreciating its meaning and would not be liable to misinterpretation,⁴⁶⁹ would not leave a misleading impression,⁴⁷⁰ and would not create confusion in the minds of the Jury.⁴⁷¹

The Judge should give sufficient indication in his record of the heads of charge that the requirements of the law have been complied with. In a certain case in connection with the record of the charge that came up before him, Batchelor, J., observed as follows :—"To ascertain whether there was misdirection to the Jury we must look to the Judge's charge of which the heads are recorded under S. 367 Cr. P. C. It is true these are only the heads of the charge, not a verbatim reproduction of what was said, but this consideration does not advance matters much here. For 1st, as was ruled in *Kasim Sheikh's Case*, (1875) 25 W. R. 32, the expression 'heads of charge' must be constructed reasonably and must be held to include such statements on the part of the Sessions Judge as will enable the appellate Court to decide whether the evidence has been properly laid before the Jury or whether there has been any misdirection in the charge. And secondly, the charge is not objected to merely on the ground of brevity. While, therefore, I am quite prepared to believe that the points noticed in the written

462. *Abbas Peada* (1878) 25 C. 736 : 2 C. W. N. 484.

463. *Panchu Doss* (1907) 34 C. 698 : 11. C. W. N. 656 : 5 Cr. L. J. 427 ; *Fanindra* (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 11 C. 970 ; *Tuka Mia* (1927) 31 C. W. N. 387 : 28 Cr. L. J. 478 : A. I. R. 1927 C. 936 : 101 I. C. 606 ; *Eknath* (1916) 1 P. L. J. 317 : 17 Cr. L. J. 353 : 35 I. C. 657 ; *Rupan Sing* (1925) 4 P. 626 : 27 Cr. L. J. 49 : A. I. R. 1925 P. 797 : 91 I. C. 225.

464. *In re Dara Narayana* (1895) 2 Weir 499.

465. *Dhiraji* (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.

466. *Monohar* (1930) 31 Cr. L. J. 1115 : A. I. R. 1930 C. 430 : 126 I. C. 775.

467. *Harendra* (1910) 11 Cr. L. J. 538 : 7 I. C. 915 (C).

468. *Amiruddin* (1917) 45 C. 557 : 22 C. W. N. 213 : 27 C. L. J. 148 : 19 Cr. L. J. 335 : 44 I. C. 321.

469. *Durga Charan* (1922) 26 C. W. N. 1002 : 36 C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922 C. 124 : 68 I. C. 407.

470. *Topandas* (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249.

471. *Edon Karikar* (1920) 21 Cr. L. J. 829 : 58 I. C. 829 (C).

record of the charge were expanded and developed in the oral statement, I cannot concede that faults apparent from the record of heads of the charge had in fact no existence. And it must be remembered that the written heads are in fact the only record we have of the Judge's address and we must perforce base our decision on that record. No do I propose to subject the charge to any exhaustive analysis ; for none is needed. On its face the charge is throughout disjointed, incoherent and even ungrammatical. Though the Judge himself says that the Jury were probably puzzled by the long addresses made to them by the respective pleaders his charge, so far from tending to enlightenment, is confused and confusing. A few minor points, selected apparently at haphazard, are noticed in a superficial and perfunctory manner, the Jury being left without any practical guidance even upon those matters. But of the real merits and essential features of the case—what the prosecution alleged against the accused—what his defence was—how the evidence bore in favour of one side or the other—as to all that, the charge is confused and defective. Many passages defy any reasonable construction and of some others it was found impossible to say whether they were statements which the Judge was making or statements which he was combating.⁴⁷²

The following extract from a judgment of Bucknill, J., shows how a charge is to be recorded : "Where heads of charge are written out before the charge is delivered or taken down verbatim, they should be placed on the record by the Judge as soon as he finds it possible to do so, and whilst what he said is fresh in his recollection. The record of the heads of charge to the Jury need not be meticulous or lengthy, but it must give accurately the substance of what the Judge said to the Jury so that the High Court may, if occasion arise, be able to ascertain from the record whether the law and the facts relative to the case were fairly and properly put to the Jury. A charge which says that certain Sections of the Penal Code were read over and explained to the Jury is quite unsatisfactory and cannot be approved of. The object of the heads of charge is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up of the evidence, not only for the prosecution but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge may have addressed to the Jury * *. The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the direction given by the Judge to the Jury, and the record should represent with accuracy the substance of the charge by the Judge".⁴⁷³

The style of the charge should not be in the nature of an exhortation. In a case in which the Judge repeatedly called up the Jury in the following terms : "Do you believe this ?" "Can you believe that ?" instead of leaving them to judge of the evidence and to decide what weight is to be attached to it, it was held that the style was very objectionable and that it was not a summing up which the law contemplates but a sustained effort at persuasion to take a particular view.⁴⁷⁴

472. *In re Shambhulal* (1908) 10 Bom. L. R. 565 : 8 Cr. L. J. 35.

473. *Rupan Singh* (1925) 4 P. 626 : 27 Cr. L. J. 49 : A. I. R. 1925 P. 797 : 91 I. C. 225. *See also* *Fanindra* (1908) 36 C. 281 : 13 C. W. N.

197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 1 I. C. 970.

474. *Rajcoomer* (1873) 19 W. R. 41 : 10 B. L. R. App. 36.

Although the method of expression and the form of a charge may be unsatisfactory, yet if in substance one can see from the heads of charge what were the directions which the Judge gave to the Jury and that they were right and proper, there can be no ground of complaint even though the phraseology and form adopted might be open to question.⁴⁷⁵

The Judge should set down in his charge what he said to the Jury about the law.⁴⁷⁶ As the law allows an appeal it is not only necessary but desirable that the charge should be recorded in intelligible form and with sufficient fulness to enable an appellate Court to satisfy itself that all points of law were clearly and carefully explained to the Jury in reference to the facts and evidence in the case.⁴⁷⁷ Under S. 367 Cr. P. C., the Judge is called upon by law to state in what way the law on the subject was explained to the Jury; the heads of charge ought also to show that the evidence was properly laid before the Jury.⁴⁷⁸ It is not necessary to write a judgment; but the charge recorded should be such as would convey information to the appellate Court in case of appeal as to the explanation of the law by the Judge and about his directions on important questions of fact.⁴⁷⁹ A mere statement in a written charge that the Sections were explained to the Jury is not sufficient; and what was in fact stated to the Jury must be set down in the charge.⁴⁸⁰ There must be sufficient materials for the appellate Court to ascertain whether he did or did not correctly explain the law or properly put the facts to the Jury.⁴⁸¹ The charge need not be written out in extenso, but the Judge should faithfully and in an intelligent form record the heads of charge on the lines upon which he addressed the Jury, both on the evidence and on the law.⁴⁸² It should be recorded in such a way as to enable the High Court to know what was actually said.⁴⁸³ In a series of rulings it has been held that where the provisions of the Section are such that they require explanation, an omission in this respect is fatal.⁴⁸⁴

475. Eknath (1916) 1 P. L. J. 317 : 17 Cr. L. J. 353 : 35 I. C. 657.

476. In re Dara Narayana (1895) 2 Weir 499.

477. Panchu Doss (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427 ; Tuka Mia (1927) 31 C. W. N. 387 : 28 Cr. L. J. 478 : A. I. R. 1927 C. 936 : 101 I. C. 606.

478. Ikramuddin (1917) 39 A. 348 : 18 Cr. L. J. 491 : 39 I. C. 331 ; Baij Nath (1903) 23 A. W. N. 232.

479. Wilson (1926) 30 C. W. N. 693 : 43 C. L. J. 537 : 27 Cr. L. J. 926 : A. I. R. 1926 C. 895 : 96 I. C. 270.

480. Kamiraddi (1933) 37 C. W. N. 1102 : 35 Cr. L. J. 483 : A. I. R. 1934 C. 77 : 147 I. C. 832 ; Rahamali (1925) 26 Cr. L. J. 1151 : A. I. R. 1925 C. 1055 : 88 I. C. 463 ; Kasimuddin (1920) 47 C. 795 : 21 Cr. L. J. 694 : 57 I. C. 934 ; Chotan Singh (1927) 7 P. 361 :

29 Cr. L. J. 804 : A. I. R. 1928 P. 420 : 111 I. C. 308.

481. Biru Mandal (1897) 25 C. 561 ; Laxumana (1898) 2 Weir 385 ; Moss (1926) 28 Cr. L. J. 278 : A. I. R. 1927 C. 460 : 100 I. C. 358 ; Dwarika (1928) 33 C. W. N. 84 : 30 Cr. L. J. 912 : A. I. R. 1929 C. 170 : 118 I. C. 351.

482. Eknath (1916) 1 P. L. J. 317 : 17 Cr. L. J. 353 : 35 I. C. 657.

483. Abdul Gafur (1922) 26 C. W. N. 996 : 35 C. L. J. 437 : 24 Cr. L. J. 8 : A. I. R. 1922 C. 192 : 71 I. C. 56.

484. Moss (1926) 28 Cr. L. J. 278 : A. I. R. 1927 C. 460 : 100 I. C. 358 ; Tuka Mia (1927) 31 C. W. N. 387 : 28 Cr. L. J. 478 : A. I. R. 1927 C. 936 : 101 I. C. 606 ; Abdul Gafur (1922) 26 C. W. N. 996 : 35 C. L. J. 437 : 24 Cr. L. J. 8 : A. I. R. 1922 C. 192 : 71 I. C. 56 ; Garibulla (1933) 37 C. W. N. 1131 : 34

But it has also been held that unless the case is extremely complicated it is enough to record as a head of the charge that the Section of the Penal Code relating to the offence charged has been read and explained to the Jury⁴⁸⁵ and the omission to record the explanation of the law does not vitiate the trial.⁴⁸⁶ So, in a certain case, where the record of the charge was "Ss. 419, 457 and 120 B and other connected Sections 415, 416, 463, 464 and 120 A of the Penal Code read and explained to the Jury", and it was contended that the charge did not disclose how the Sections were actually explained: *Held*, that there would have been some force in the contention if there was any special difficulty about any of these Sections, but none of the Sections presented any particular difficulty and what was said in the charge was sufficient explanation.⁴⁸⁷

The heads of charge need not be reduced to writing before delivery of the charge but they ought to be written as soon as possible thereafter and when the facts are fresh in the Judge's mind.⁴⁸⁸

18. How the Charge is to be delivered.—

Under the law the Judge himself has to charge the Jury. But where the Judge wrote out the charge and it had to be delivered to the Jury in Urdu, a language of which the Judge was ignorant, and the charge was translated into that vernacular and the translation was read out to the Jury by the Government Pleader: *Held*, that the procedure was not illegal.⁴⁸⁹ Where a juryman did not know English and the charge was translated by the Public Prosecutor in the presence of the defence Counsel and read out to the Jury, and the accused was found guilty by the Jury unanimously, it was held that the accused was not prejudiced.⁴⁹⁰ In this last-mentioned case it was observed that the procedure was unfortunate but was not unfair and did not cause any prejudice to the accused and so did not vitiate the trial, but that in such circumstances it is desirable that the *peshkars* or the Judges themselves should explain the charge to the juryman who does not know English.

Cr. L. J. 1231 : A. I. R. 1933 C. 722 : 146 I. C. 237 ; Kamiraddi (1933) 37 C. W. N. 1102 : 35 Cr. L. J. 483 : A. I. R. 1934 C. 77 : 147 I. C. 832 ; Dwarika (1928) 33 C. W. N. 84 : 30 Cr. L. J. 912 : A. I. R. 1929 C. 170 : 118 I. C. 351.

485. Dhanpat (1929) 9 P. 148 : 31 Cr. L. J. 786 : A. I. R. 1930 P. 243 : 125 I. C. 131 ; Biru Mandal (1897) 25 C. 561.

486. Chotan Singh (1927) 7 P. 361 : 29 Cr. L. J. 804 : A. I. R. 1928 P. 420 : 111 I. C. 308 [distinguishing Durga Charan (1922) 26 C. W. N. 1002 : 36 C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922 C. 124 : 68 I. C. 407 ;

Rupan Singh (1925) 4 P. 626 : 27 Cr. L. J. 49 : A. I. R. 1925 P. 797 : 91 I. C. 225 ; Moss (1926) 28 Cr. L. J. 278 : A. I. R. 1927 C. 460 : 100 I. C. 358]

487. Hanif (1932) 34 Cr. L. J. 56 : A. I. R. 1932 C. 786 : 140 I. C. 723.

488. Fanindra (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 1 I. C. 970.

489. Sur Nath (1927) 50 A. 365 : 28 Cr. L. J. 950 : A. I. R. 1927 A. 721 : 105 I. C. 662.

490. Dwijapada (1928) 47 C. L. J. 449 : 29 Cr. L. J. 638 : A. I. R. 1928 C. 401 : 109 I. C. 910.

CHAPTER VIII.

F.-Conclusion of trial in Cases tried by Jury—Ss. 300-306.

and

G.-Retrial of Accused after Discharge of Jury.—S. 308.

Verdict.

S. 300. In cases tried by jury, after the Judge has finished his charge, the jury may retire to consider their verdict.

Except with the leave of the Court, no person other than a juror shall speak to, or hold any communication with, any member of such jury.

S. 301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

S. 302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

S. 303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) Such questions and the answers to them shall be recorded.

S. 304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

S. 305. (1) When in a case tried before a High Court the jury are unanimous in their opinion, or as many as six are of one opinion and the Judge agrees with them, the Judge shall give judgment in accordance with such opinion.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the Jury.

S. 306. (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of S. 562, pass sentence on him according to law.

S. 308. Whenever the Jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another Jury unless the Judge considers that he should not be retried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

List of Headings :—

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COMMENTARY.—

1. Preliminary.—

The provisions of this Code relating to the reconsideration or amendment of the verdict and questioning of the Jury are the following :—

S. 302. If the Jury are not unanimous the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable the Jury may deliver their verdict although they are not unanimous. * * *

S. 303. (1) And the Judge may ask them such questions as are necessary to ascertain what their verdict is.

(2) Such questions and answers to them shall be recorded.

S. 304. When by accident or mistake a wrong verdict is delivered, the Jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

S. 305. When in a case tried before a High Court * * *

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the Jury.

S. 305 cl. (4), therefore, contemplates a further consideration as mentioned in S. 302.

The above also was the law under Act X of 1882. In Act X of 1872 there were provisions in S. 263 corresponding to S. 302 and part of S. 303 quoted above, but not to

the other Sections. In Act XXV of 1861 there a provision in S. 352 corresponding to S. 302 only, the word 'finding' being used instead of the word 'verdict'.

On the provisions of the law as it stands at present it seems clear :—(1) that in the case of a unanimous verdict the Judge cannot require the Jury to consider the verdict further ; (2) that the Judge may ask the Jury such questions as are necessary to ascertain what their verdict is ; (3) that the questions and the answers must be recorded ; and (4) that a wrong verdict delivered by accident or mistake may be amended either before or immediately after it is recorded. Upon the aforesaid provisions a question also arises as to whether they are exhaustive and therefore, by implication, exclude the power of the Judge to ascertain the reasons for the verdict in order to decide whether he would dissent from it or not, a question about which there is some conflict of judicial opinion. We now proceed to deal with the subject under different headings.

2. Retirement of the Jury to consider their Verdict.—S. 300.

After the Judge has finished his charge, the Jury may retire to some room arranged for the purpose, to consider what should be their verdict. The Jury *may* retire, it is not necessary that they *must* retire in every case. They may, as soon as the charge is finished, deliver their verdict without retiring, if they can come to a definite conclusion then and there. If they cannot do so and want to have consultation amongst themselves, they must forthwith retire to the jury-room and then consider their verdict without any chance of outside communication. Dispersal of the Jury for several hours, after the charge and before the consideration and delivery of the verdict, vitiates the trial.¹ All the jurors must be in the retiring room together during the whole time.² In complicated cases they ought to retire and take reasonable time to consider their verdict ; for, as Field J., observed in a case,—“It appears that the Jury retired for 8 minutes only and in this case I desire to observe that this was insufficient to enable the Jury to consider the evidence and deliberate thereon amongst themselves.”³

English Cases.—

The Jury are bound to deliberate in private and if a stranger, whether an officer of the Court or not, is present for a substantial time during their deliberations, then their verdict is vitiated (*Goby v. Wetherill*, (1915) 2 K. B. 674). During the retirement of the Jury no officer of the Court may enter into any discussion with the Jury as to the case or answer any question put by them. If any further assistance is required by them it must be given in open Court by the Judge in the presence of the accused. (*Willmot* (1914) 10 Cr. A. R. 173 : 78 J. P. 352). Where a juror, after the summing up and after the Jury had deliberated in the box for some minutes, signified their wish to retire to consider

1. Sariman Ahir (1924) 26 Cr. L. J. 861 : A.I.R. 1925 P. 595 : 86 I. C. 717.

2. Keseruddin (1930) 31 Cr. L. J. 1090 : A. I. R.

1930 C. 446 : 126 I. C. 753 [referring to *R. v. O'Connell* 1 Cox. C. C. 410.]

3. Roghuni Singh (1882) 9 C. 455 : 11 C. L. R. 569.

their verdict, separated from his colleagues by mistake and left the building and was absent for a quarter of an hour before rejoining them, it was *held* on appeal to constitute an irregularity which rendered all the proceedings abortive and that the only course open to the Court was to discharge the Jury and commence the proceedings afresh and that it was not relevant to consider whether the irregularity had in fact prejudiced the accused. (*Ketteridge*, (1915) 1 K. B. 467 : 84 L. J. (K. B) 352 : 11 Cr. A. R. 54.)

It is highly undesirable that a Jury in any case, much more in a criminal case, should have any communication with anybody, who is not a juror, upon the subject-matter of the trial. It is highly undesirable that a Police Constable should be stationed anywhere or in any position in which he can hear the deliberations of the jurymen or that anybody should be in a position where it is possible for him to know the form the deliberations of the Jury took, or what view any particular juror expressed about the matter. It is a dangerous thing for a Court to rely upon anything except the verdict of the Jury or to listen to the statements of individual jurymen made to this or that person, after they had performed their duty and delivered their verdict.⁴ The Jury are to make their deliberations in private; the presence of a stranger for a substantial time in their room when they are deliberating vitiates the verdict.⁵ When it was proved that after the charge had been delivered, a person other than a juror spoke to or held communication with a member of the Jury without the leave of the Court : *held*, that that was sufficient to upset the verdict, and it was not relevant to consider whether the irregularity had in fact prejudiced the accused; and that it is a matter of great importance that S. 300 Cr. P. C, which is explicit in its terms should be observed.⁶

When a Jury put a single question to the Judge in Chambers, on a point of law, whereupon they were taken into Court and their question was answered, it was held that it was only an irregularity.⁷ If a Jury, after retiring to consider their verdict, address a question to the Bench, it should be asked publicly. See Notes under heading "*When a new juror shall be added &c*" in Pt. II Ch. III. *ante*. See also cases under heading "*Locking up Jury*" in Pt. II Ch. VI *ante*.

It is improper for a juror to communicate the deliberations of the Jury to the public or for any one to publish such communication.⁸

3. Meaning of the term 'Verdict'.—

By 'verdict' should be understood the collective opinion of the Jury as a body, arrived at after mutual consultation and ascertained and announced by the foreman. In cases of

4. In re Bonomally (1916) 44 C. 723 : 21 C. W. N. 167 : 18 Cr. L. J. 311 : 38 I. C. 423 [referring to Reg. v. Murphy (1869) L. R. 2 P. C. Ap. Ca. 535]

5. Goby v. Weatherill (1915) 2 K. B. 674.

6. Benimadhab (1918) 46 C. 207 : 22 C. W. N. 740 : 27 C. L. J. 553 : 19 Cr. L. J. 737 : 46

I. C. 513 [referring to R v. Ketteridge (1915) 1 K. B. 467 : 11 Cr. A. R. 54.]

7. Bilash (1922) 27 C. W. N. 626 : 25 Cr. L. J. 343 : A. I. R. 1923 C. 647 : 77 I. C. 231.

8. Lenton (1919) 14 Cr. A. R. 105.

9. Armstrong (1922) 16 Cr. A. R. 149.

disagreement amongst the Jury, the individual opinions of the members are never intended to be disclosed.¹⁰ The verdict which the foreman is called upon to deliver is the verdict arrived at unanimously, or by the majority.¹¹ By 'verdict' must be understood the final verdict which the Judge would be bound to record ; when the Jury misunderstood the charge and the Judge had to put questions to understand the real meaning of the verdict originally delivered, and which question the Judge was empowered to put under S. 303 Cr. P. C., the original verdict was no verdict, and there could be no verdict recorded until the last of the questions had been answered.¹² Intermediate verdicts are not recognized in law. Where a Sessions Judge, without summing up the entire case to the Jury and without charging them on all the issues involved, drew their attention to the evidence relating to the time of occurrence, upon which the whole case depended, and asked them to return an intermediate verdict of not guilty : *Held*, that the procedure followed was highly irregular and that the case should be retried.¹³ The verdict must be a genuine verdict brought in after proper consideration : the Jury cannot abdicate their functions in favour of the Judge. Where a Jury returned a verdict that they agreed with whatever opinion the Sessions Judge might form, and on being asked to give a proper verdict came back within nine minutes with another verdict and the Judge accepted the verdict remarking that he disagreed with it : *Held*, that it could not be said under the circumstances that the Jury had properly considered the case and brought in a genuine verdict.¹⁴ The law expects a jurymen to exercise his own understanding on the case submitted to him and to decide on evidence and not to follow the opinion of his fellows.¹⁵ The Jury have not to return a verdict upon their moral belief of a case but upon legal proof of the facts constituting the offence.¹⁶

The term 'verdict' in S. 423 Cl. (d) Cr. P. C., means the entire verdict on all the charges framed, in case of a trial for various offences as provided by S. 236 Cr. P. C. The term is not limited to a verdict on a particular charge on which the accused is convicted and the conviction on which is appealed against.¹⁷

There is no intermediate stage between guilty and innocent¹⁸ (quoting *Re v. Plummer*¹⁹ in which Bruce, J. said : "It is a very dangerous principle to regard a verdict of not guilty as not fully establishing the innocence of the person to whom it relates").

A verdict of 'not guilty' covers every degree of mental condition from mere hesitating

10. Abdul Hameed (1912) 36 M. 585 : 15 Cr. L. 197 : 22 I. C. 981 ; Jagannath (1925) 2 O. W. N. 534 : 26 Cr. L. J. 1346 : A. I. R. 1925 O. 746 : 89 I. C. 386.

11. S. 301 Cr. P. Code.

12. Appa (1884) 8 B. 2 O. 211 ; Sustiram (1873) 21 W. R. 1.

13. Nasar Darzi (1928) 33 C. W. N. 451 : 30 Cr. L. J. 434 : A. I. R. 1929 C. 62 : 115 I. C. 257.

14. Abdul Barik (1928) 48 C. L. J. 477 : 30 Cr. L. J. 54 : A. I. R. 1928 C. 827 : 113 I. C. 70.

15. Petamber v. Nasaruddy (1875) 25 W. R. 4 (a case under Sec 521 etc. of Act X of 1872, i. e., relating to removal of obstruction to a public pathway.)

16. Enayat Husain (1926) 49 A. 209 : 28 Cr. L. J. 15 : A. I. R. 1926 A. 752 : 99 I. C. 47.

17. Krishna Dhan (1894) 22 C. 377.

18. Noni Gopal (1910) 15 C. W. N. 646 : 12 Cr. L. J. 396 : 11 I. C. 580.

19. (1902) 2 K. B. 339 : 20 Cox. C. C. 243.

doubt as to the guilt of the accused to a complete conviction of his innocence. A verdict 'that they (the jurors) give the accused the benefit of the doubt' is not known to law.²⁰

A Jury returned a unanimous verdict of 'doubt', and when the Judge asked them their opinion about a certain part of the case they admitted that they had not considered it ; then the Judge sent the Jury back to consider that part of the case and the Jury returned with a verdict of guilty ; it was held that there was nothing illegal in the procedure adopted.²¹ It is not open to a Judge to construe a verdict of 'not guilty' of the Jury or the majority of them as being open to the hypothesis that they have considered the accused guilty of some misconduct not amounting to the offence ; the only legitimate inference is that in the opinion of the Jury or the majority of them, as the case may be, it is not established that the accused has committed the offence with which he was charged.²²

4. Delivery of Verdict—Ss. 301-302.—

When the Jury have considered their verdict and have come to a conclusion either unanimously or by majority, they shall return to the jury-box in the Court and deliver their verdict through the foreman. The law requires a jurymen to exercise his own understanding on the case submitted to him, and to decide on evidence, and not to follow blindly the opinion of his fellows ; where one out of three (in a Jury of five) depends on the opinion of the other two, the verdict of the three is not that of a legal majority.²³ When the foreman has delivered the verdict in the hearing of the other jurors and without dissent from any of them, it is conclusive and cannot be challenged thereafter by any of the jurymen.²⁴ In *R. v. Wooller*²⁵ a contention was raised that the delivery of the verdict by the foreman was not made in the hearing of all the jurors and to support the contention it was proposed to produce affidavits of some of the jurors. Lord Ellenborough, C. J. said,—“Court think that they are precluded from the means of acquiring that knowledge through an affidavit of any of the jurors; if they cannot agree in their verdict they ought to express dissent at the time. But if the jurors, at the time when the verdict was delivered by the foreman, had not the means of hearing what was propounded for them, there is no need of their affidavits upon that point. If the verdict had been given under such circumstances as ordinarily occur, the Court would infer their consciousness of what was propounded by their foreman. But the danger would be infinite from allowing such affidavits to be received ; and this has doubtless in former times deterred the Court from yielding to such applications”.

If the verdict be unanimous, the Judge is bound to receive it unless contrary to law, and if the Judge dissents, he may act under S. 307 Cr. P. C. ²⁶ See Notes under heading “*Questioning the Jury*”, *post*.

20. Panchanon (1932) 37 C. W. N. 341 : 34 Cr. L. J. 608 : A.I.R. 1933 C. 404 : 143 I.C. 600.

21. Sur Nath (1927) 50 A. 365 : 28 Cr. L. J. 950 : A. I. R. 1927 A. 721 : 105 I. C. 662.

22. Ahmed Shah (1929) 23 S. L. R. 397 : 30 Cr. L. J. 877 : A.I.R. 1929 S. 145 : 118 I. C. 195.

23. Petamber v. Nasaruddy (1875) 25 W. R. 4.

24. Dada Ana (1889) 15 B. 452, 467 (Citing Wooller (1817) 2 Stark. III : 6 M. & S. 366). See also Brian Bonham (1912) 13 Cr. L. J. 815 (F. B.) : 17 I. C. 559 (Punj.)

25. (1817) 2 Stark. III : 6 M. & S. 366.

26. Mahaddi (1880) 5 C. 171 ; Wuzir Mundul (1876) 25 W. R. 25.

If the foreman informs the Judge that they are not unanimous, the Judge may under S. 302 require them to retire for further consideration, and it is open to the Judge to give at the same time further directions on matters of law.²⁷ The object of S. 302 is to secure, if possible, an unanimous verdict. The Judge, when informed that the Jury are not unanimous, should not make minute enquiries to learn the nature of the majority and its opinion so that he may have the opportunity of accepting or refusing that opinion as a verdict, according as it coincides with his own opinion or not. The Judge should only require the Jury to retire for further consideration, for it is quite possible that, on further discussion, what was the majority might have become the minority, and in all fairness to the accused this course should be followed. If, however, the Judge goes so far as to ask the Jury what is the exact majority and what is the opinion of the majority, then whatever may have been the individual opinion of the Judge, he ought to receive that verdict without hesitation, and if he differs from it he should proceed as directed by S. 307 Cr. P. C.²⁸ After the verdict has been actually delivered by the Jury, the Sessions Judge cannot, under the provisions of S. 302 Cr. P. C., require them to retire for further consideration. He can do so after ascertaining that the verdict is not unanimous but only before it has been actually delivered.²⁹

The Jury may then take such time as the Judge considers reasonable for this further consideration and then deliver their verdict, although they are still not unanimous (S. 302). The Judge cannot again ask them to consider that verdict; if it is clear and specific, he must either accept it or act under S. 307. The Judge is only entitled to question the Jury as to their verdict where it is ambiguous or incomplete, and may ask the Jury only such questions as are necessary for ascertaining what their verdict is.³⁰ (*See Notes under heading "Questioning the Jury", post*).

Where there are more than one accused and there are several charges, the officer of the Court should take the verdict of the Jury upon each charge separately.³¹

5. Reconsideration of Verdict.—

Where after a verdict of 'guilty' by the Jury, there was a further charge by the Judge, and then a verdict of 'not guilty', the procedure is illegal and vitiates the trial.³² A Judge cannot refuse to accept the verdict of the Jury acquitting the prisoner on the first count and finding him guilty on the second, and require them to find the prisoner guilty on the first count; the Judge has no power to control the Jury in this manner; he should record the finding on the

27. Bharmia (1895) Rat. 736 : 1 Cr. L. J. 265 : 6 Bom. L. R. 258.

28. Hurry Churn (1883) 10 C. 140, 145 : 13 C. L. R. 358. *See also* Chunilal (1898) Rat. 982, 984 ; Jhubboo Mahton (1882) 8 C. 739, 754 ; Bharmia (1895) Rat. 736 : 1 Cr. L. J. 265 : 6 Bom. L. R. 258 ; Kya Nyun (1913) 15 Cr. L. J. 678 : 25 I. C. 1006 (Bur.)

29. Kyu Nyun (1913) 15 Cr. L. J. 678 : 25 I. C. 1006 (Bur.)

30. Abdul Hameed (1912) 36 M. 585, 590 : 15 Cr. L. J. 197 : 22 I. C. 981.

31. Eran Khan (1923) 50 C. 658 : 24 Cr. L. J. 838 : A. I. R. 1924 C. 47 : 74 I. C. 950.

32. Jahey Sheikh (1927) 32 C. W. N. 144 : 29 Cr. L. J. 228 : A. I. R. 1928 C. 228 : 107 I. C. 90 ; Dori (1935) 1935 A. L. J. 1142 : 36 Cr. L. J. 1377 : A. I. R. 1935 A. 1020 : 158 I. C. 438.

first count as the verdict of not guilty and on the second count guilty, and sentence the prisoner accordingly.³³ But where the Jury first returned a confused verdict and the Judge directed them afresh and thereupon they gave a second verdict, it was held that the conviction based on the second verdict need not be set aside.³⁴ A Judge is not wrong in directing a Jury to reconsider their verdict when it appears from a statement accompanying their verdict that they were confused and failed to understand the remarks of the Judge. The act of a Judge in giving a Jury, who are not intelligent men, in a complicated case, a paper in which the different counts against each prisoner and the witnesses whose testimony bore upon each count are noted is not objectionable.³⁵ The Judge is not obliged to accept the absurd verdict of a Jury and is entitled to tell the Jury to consider the matter over again ; there is no duty on the Judge to accept and interpret for himself such a verdict when the Jury are there and can give a proper verdict ; cross-examination of the foreman in such a case is not a proper procedure.³⁶ Thus, where the Jury gave the verdict in the following form : "We have no doubt that the prisoner killed N. We think N gave no provocation, but we do not think it murder, because the prisoner had no object in killing him" ; the Judge thereupon requested the Jury to reconsider the verdict with reference to the exception already brought to their notice. On their return, they brought in a verdict of guilty of murder. *Held*, as the first verdict was not a legal finding, the Judge was justified in directing the Jury to reconsider that verdict, and the second verdict was the legal verdict in the case.³⁷ So, when a Jury found that the accused was guilty of murder but refused to convict him because there had been no eye-witnesses ; *held*, that the Judge ought to have explained to the Jury that the testimony of eye-witnesses was not necessary to the establishment of a charge of murder and that the Jury, if they had no doubt as to the guilt of the accused, were bound to give effect to the conclusion at which they had arrived.³⁸

The Judge is bound to explain the law again when the Jury, on being asked about their verdict, show by their conduct that they were not able to follow his summing up.³⁹ When the Jury are not unanimous, it is open to the Judge to further direct them on matters of law at the time of requiring them to retire for further consideration.⁴⁰ When it is clear that the Jury had not understood the law and that fact is disclosed by answers to questions which the Judge was bound to put to the Jury, the Judge is entitled to ask further questions to ascertain what their verdict really was. If the Jury ask for permission to reconsider their verdict, the Judge would be justified in giving such permission and accept the verdict of the Jury after such reconsideration.⁴¹ But where the verdict is clear and not vitiated by any accident or mistake, the Judge has no power either to question the Jury as to their reasons

33. Joykisto (1867) 7 W. R. 22. *See also* Sakhaut (1865) 2 W. R. 13.

34. Girish Chandra (1931) 58 C. 1335 : 33 Cr. L.J. 135 : A. I. R. 1932 C. 118 : 135 I. C. 443,

35. Veerappan (1894) 2 Weir 514. *See also* Narayan (1902) 30 C. 485, 487.

36. Hamid Ali (1929) 57 C. 61 : 31 Cr. L.J. 761 : A. I. R. 1930 C. 320 : 125 I. C. 97.

37. Uckoor (1864) 1 W. R. 50.

38. Gokool (1876) 25 W. R. 36.

39. Palavesa Tevan (1911) 1 M. W. N. 190 : 12 Cr. L. J. 140 : 9 I. C. 788.

40. Bharmia (1895) Rat. 736 : 1 Cr. L. J. 265 : 6 Bom L. R. 258.

41. Nga Tin Gyi (1926) 4 R. 488 (F. B.) : 28 Cr. L. J. 213 : A. I. R. 1927 R. 68 : 99 I. C. 1013.

for the verdict under S. 303, or to direct them to amend their verdict under S. 304, even if the Jury had mistaken the law ; if such a mistake had resulted in an erroneous verdict, the only course open for the Judge is to refer the case to the High Court under S. 307 ; it is not open to him in these circumstances to address another charge to the Jury on the law and to request them to reconsider their verdict in the light of his legal instructions.⁴² When the Judge is not minded to accept what is obviously and admittedly an inconsistent verdict of the Jury, he can make further charge to the Jury without referring the case to the High Court for consideration.⁴³ The prisoner was charged under S. 302 I. P. C. ; the Jury returned a verdict of guilty under S. 304 I. P. C. The Judge thought the verdict was incorrect and put to the Jury general questions on intention and knowledge to ascertain if those points had been considered by them ; and being of opinion that the Jury had not understood the law, the Judge again explained the law to them. The Jury then returned a fresh verdict of guilty under S. 302 I. P. C. *Held*, that the fresh verdict could not be accepted and there must be a retrial.⁴⁴

Where part of the finding of the Jury is not clear in law though another part of the finding is an acquittal on certain counts, the Judge is entitled to ask them to reconsider their verdict.⁴⁵

6. Majority Verdict given out as unanimous Verdict.—

In a trial before a Judge of the Chief Court of Lahore, the foreman publicly announced the verdict of "not guilty" as the unanimous verdict of the Jury, in the hearing of all the jurors and without dissent on the part of any of them. The verdict was recorded and the prisoner was acquitted. From information received some days afterwards, the trying Judge was led to believe that, as a matter of fact, the jurors were not agreed as regards the verdict. The Judge summoned the foreman of the Jury and examined him on oath. He deposed that the verdict given as the unanimous verdict was really the verdict of a majority of the jurors and was given as the unanimous verdict owing to a misunderstanding that the opinion of the majority was binding on all the jurors. The Judge thereupon referred the matter to the Full Bench under S. 11 of the Punjab Courts Act. *Held* : (1) that the Full Bench had authority to give opinion on the matter ; (2) that the Court had no jurisdiction in consequence of the foreman's subsequent statement, to set aside a verdict given in open Court, and in the hearing of all the jurors, and the formal order of acquittal that followed thereupon.⁴⁶ On an application for retrial on the ground that the verdict was not unanimous the Court of Appeal received affidavits of certain of the jurors that they did not hear this verdict delivered and did not assent to it, and accepting the affidavits ordered new trial.⁴⁷

42. *In re Sundaram* (1931) 61 M. L. J. 915 : 32 Cr. L. J. 1276 ; A. I. R. 1931 M. 775 : 134 I. C. 986 ; *Sadek* (1933) 61 C. 256 (S. B.) : 38 C. W. N. 254 : 35 Cr. L. J. 496 : A. I. R. 1934 C. 173 : 147 I. C. 860.

43. *Rafat Sheikh* (1933) 60 C. 729 : 34 Cr. L. J. 1084 : A. I. R. 1933 C. 640 : 145 I. C. 861.

44. *Sadek* (1933) 61 C. 256 (S. B.) : 38 C. W. N.

254 : 35 Cr. L. J. 496 : A. I. R. 1934 C. 173 : 147 I. C. 860.

45. *Hutchinson* (1911) 7 Cr. A. R. 19.

46. *Brian Bonham* (1912) 13 Cr. L. J. 815 (F. B.) : 17 I. C. 559 (Punjab) [See the English and American decisions referred to in this case.]

47. *Ellis v. Deheer* (1922) 2 K. B. 113 C. A.

7. Verdict, settled by casting lots.—

Where it is alleged that the verdict of the Jury was arrived at by casting lots and the Sessions Judge held an enquiry into the matter, in the course of which he examined, besides other persons, all the jurors ; *held*, that the statement of a juror as to what happened in the jury-room is inadmissible, but the evidence of others is receivable.⁴⁸

English Cases—

If a Jury casts lots for their verdict it shall be set aside. The Jury having sat up all night agreed in the morning to put two papers in a hat marked plaintiff and defendant and to draw lots ; plaintiff came out and they found for the plaintiff which happened to be according to the evidence and the opinion of the Judge. Upon motion for a new trial it was agreed that the verdict must be set aside (*Hale v. Cove* (1725) 1 Stra. 642). The Jury having tossed up for their verdict, it was held that such conduct is a very high misdemeanour (*Vaise v. Delaval* (1785) 1 Term. R. 11). To prove that the Jury had tossed up for their verdict the affidavit of some of the jurymen themselves could not be admitted in evidence because in all of them such conduct was high misdemeanour, and also because otherwise no verdict would be safe, but that in every case the Court must derive its knowledge from some other source, such as from some person having seen the transaction through a window or by some other means—*Vaise v. Delaval*, (1785) 1 Term. R. 11 ; *Straker v. Graham* (1839) 4 M. & W. 1074 ; *Quinlane v. Murnane* (1885) 18 L. R. Ir. 53, C. A.

8. Verdict based on private knowledge of Jury.—

A verdict obtained on a trial, in the course of which the Judge finds that the jurors were biased in favour of the prosecution and that they were influenced by their private knowledge based on what they had heard outside Court, cannot be sustained.⁴⁹ Expression of opinion by juror outside Court, during the course of the trial, vitiates the verdict, which therefore must be set aside and the case should be ordered to be retried by a fresh Jury.⁵⁰

9. Mode of delivering Verdict—General Verdict—Special Verdict.—

The statute law in this country has not laid down any particular form in which the Jury are to deliver their verdict. Consequently, there is no legal bar in the way of the Jury to return their verdict in any way they think fit, provided it is complete and exhaustive as to the facts in issue which go to make up the charges.⁵¹ The law does not prescribe any specific form in which the Jury are to return their finding ; they are at liberty to deliver it in any form

48. Harakumar (1913) 40 C. 693 : 17 C. W. N. 787 ; 14 Cr. L. J. 392 : 20 I. C. 216.

49. Dhararidhar (1933) 59 C. L. J. 15 : 35 Cr. L. J. 1311 : A. I. R. 1934 C. 432 : 151 I. C. 365.

50. Nazir Ali (1920) 25 C. W. N. 240 : 33 C. L. J. 122 : 22 Cr. L. J. 510 : 62 I. C. 334 ; Bideshi (1936) 37 Cr. L. J. 739 : 162 I. C. 705 (O.).

51. Kasimuddin (1934) 60 C. L. J. 45 : 36 Cr. L. J. 480 : A. I. R. 1935 C. 31 : 154 I. C. 110. See also Khudiram (1906) 12 C. W. N. 530 (F. B.) : 7 Cr. L. J. 362 ; Safdar (1922) 49 C. 905, 908 : 24 Cr. L. J. 379 : A. I. R. 1922 C. 508 : 72 I. C. 379.

they think fit ; and if that finding is not exhaustive as to the facts in issue which go to make up the charge or charges, it is competent to the Judge, and is indeed his duty, to put such questions to them as should elicit a complete finding.⁵² Under the Code of 1861 Campbell, J. said :—"Especially, he (the Sessions Judge) has addressed himself to that which I have before observed to be too frequently neglected in affray cases, viz., to find which party was the aggressor and whether either exercised wholly or to some degree a right of private defence. To ascertain this and to guide his judgment in regard to the severity of the sentence, he had, before taking the verdict of guilty or not guilty, put some specific questions to the Jury. The practice is, I think, in such a case worthy of all commendation. It is not expressly provided for in the Code of Criminal Procedure, but there is nothing there inconsistent with such a practice ; and as I have had considerable practical experience of trial by Jury in England (though more in Civil than in Criminal cases) I may add that the practice of putting specific questions to the Jury is not uncommon there.⁵³ In England the Jury may find either a *general verdict* on the whole matter in issue or a *special verdict* on the particular facts ; they may refuse to answer questions ; the option is that of the Jury, not of the Judge. If the Jury choose to return a special verdict, *it must be on the naked facts* ; it must state positively the facts themselves and not merely the evidence adduced to prove them, and all the facts necessary to enable the Court to give the judgment must be found. * * * By finding a special verdict the Jury protected themselves, leaving the question of law to the separate determination of the Judge. * * * The present law in India is, like that of England, designed to secure a certain and complete finding on the matter in issue at the trial ; and both Judge and Jury have a duty as regards completeness and certainty. (See S. 303)⁵⁴ Where, instead of the ordinary verdict in the form of 'guilty' or 'not guilty', a special verdict stating facts found by them is returned by the Jury, and this special verdict is ambiguous or defective in regard to matters forming part of the offence, e.g., intention, knowledge, common object or abetment, it is the duty of the Judge to ascertain its meaning by questioning the Jury under S. 303 Cr. P. C. In dealing with a special verdict, the Judge is confined to facts positively stated in the verdict and cannot of himself supply by intendment or implication any defect in the statement.⁵⁵ Where a Jury gives a general verdict without ambiguity or defect, they are not bound to say whether they proceed on the facts or the law.⁵⁶ Nor is the Sessions Judge entitled to put questions to the Jury, after it has delivered its general verdict, with a view to bring on record the points on which his opinion is at variance with the Jury.⁵⁷ The Jury are not bound to find a simple verdict of guilty or not guilty ; they may find a special verdict or a string of facts to which the Judge applies the law.⁵⁸ The Judge may formulate specific questions to the Jury and it is useful in complicated cases to do so, but the formulation of such questions

52. Hariprasad (1872) 8 B. L. R. 557 : 14 W. R. 59, 62.

53. Mitto Sing (1865) 3 W. R. 41.

54. Per Jardine, J. in Dada Ana (1889) 15 B. 452, 465.

55. Abdul Razak (1894) Rat. 710, 714 ; Madhavrao (1894) 19 B. 735,

56. Gorachand (1868) 3. B. L. R. 1, 12 (F. B.)

57. Desai Daji (1889) Rat. 442, 447.

58. Devji Govindji (1895) 20 B. 215 [following Dada Ana (1889) 15 B. 452 ; R. v. Dudley 14 Q. B. D. 273]

requires great care and should be limited to the lowest compass.⁵⁹ A special verdict may be necessary to adjudge the sentence.⁶⁰

A contrary view has been taken by the Madras High Court. It has held that the Code of Criminal Procedure does not permit the recording of what is known in English law as a 'special verdict,' i.e., when the Jury state their finding on the facts themselves, leaving it to the Judge to apply the law to those facts and himself find the prisoner 'guilty' or 'not guilty'. The Judge is empowered to require the Jury to return a verdict of guilty or not guilty.⁶¹

10. Reasons for the Verdict.—

The law does not require the jurors to give their reasons for the verdict, they may state them if they desire.⁶² S. 303 Cr. P. C does not authorise the Sessions Judge to put questions to the Jury as to the reasons for their decision, though a reference under S. 307 Cr. P. C is not rendered invalid by reason of the Sessions Judge having asked such questions.⁶³ The Jury may refuse to answer such questions.⁶⁴ But when the Judge disagrees with the verdict and wishes to refer the case to the High Court under S. 307, the Sessions Judge should ask the Jury their reasons for their verdict.⁶⁵ For other cases, see Notes under the heading "*Meaning of the word Opinion*" in Part IV Chap. IV, *post*.

11. Observations of the Jury.—

The Jury should not, generally, be stopped from making observations after verdict, as they may recommend mercy, or they may disclose thereby a misunderstanding of the case, and the Judge would then have to re-charge them and not record the verdict. So where the foreman added after a verdict of conviction "that the land and crops were theirs" (accused's), the latter were held to have been seriously prejudiced by the Judge stopping him at once.⁶⁶

As regards recommendation for mercy Sir James Fitz-james Stephen says:—"The English system allows the Jury to exercise at least as much influence on the degree

59. Rupan Singh (1925) 4 P. 626, 644, 645 : 27 Cr. L. J. 49 : A. I. R. 1925 P. 797 : 91 I. C. 225.

60. Barendra (1924) 28 C. W. N. 170 (F. B.) : 38 C. L. J. 411, 561 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353.

61. Arunachella (1912) 13 Cr. L. J. 586 : 15 I. C. 1002 (M) [not following Dada Ana (1889) 15 B. 452 ; Madhavrao (1894) 19 B. 735]

62. Chellan (1905) 29 M. 91, 93 : 3 Cr. L. J. 371.

63. In re Subbiah Thevan (1920) 43 M. 744 : 21 Cr. L. J. 456 : 56 I. C. 498. See also Dada Ana (1889) 15 B. 452, 466 ; In re Rama Naicker (1912) 22 M. L. J. 355 : 13 Cr. L. J. 285 : 14 I. C. 669 ; Karim Dai (1930) 35 C. W. N. 407 : 33 Cr. L. J. 29 : A. I. R. 1931 C.

636 : 134 I. C. 1133 ; Derajtulla (1929) 34 C. W. N. 283 : 31 Cr. L. J. 1150 : A. I. R. 1930 C. 443 : 127 I. C. 79 ; Ramjag (1927) 7 P. 55 : 29 Cr. L. J. 465 : A. I. R. 1928 P. 203 : 109 I. C. 114 [following Ali Hyder (1923) 26 Cr. L. J. 856 : A. I. R. 1923 P. 474 : 86 I. C. 712]

64. In re Subbiah Thevan (1920) 43 M. 744, 746, 747 : 21 Cr. L. J. 466 : 56 I. C. 498 ; Dada Ana (1889) 15 B. 452, 464.

65. Punit Chain (1922) 1922 P. 218 : 23 Cr. L. J. 421 : A. I. R. 1922 P. 348 : 67 I. C. 581 ; In re Pamanna (1884) 2 Weir 388 ; Sadek (1933) 61 C. 255 (S. B.) : 38 C. W. N. 254 : 35 Cr. L. J. 496 : A. I. R. 1934 C. 173 : 147 I. C. 860.

66. Narayan (1902) 30 C. 485.

of punishment to be inflicted on those whom they may convict as they ought to have. It is true that the recommendation to mercy of an English Jury has no legal effect and is no part of their verdict, but it is invariably considered with attention and is generally effective. In cases where the Judge has a discretion as to sentence he always makes it lighter when the Jury recommend the prisoner to mercy. In capital cases, where he has no discretion, he invariably informs the Home Secretary at once of the recommendation and it is frequently, perhaps generally, followed by a commutation of the sentence. This seems to me infinitely preferable to the system of *circonstances atténuantes*. Though the impression of a Jury ought always to be respectfully considered, it is often founded on mistaken grounds, and is sometimes a compromise. It is usual to ask the reason of the recommendation, and I have known at least one case in which this was followed first by silence and then by a withdrawal of the recommendation. I have also known cases in which the Judge has said, "Gentlemen, you would hardly have recommended this man to mercy if you had known as I do that he has been repeatedly convicted of similar offences." There are also cases in which the recommendation is obviously grounded on a doubt of the prisoner's guilt, and in such cases I have known the Judge tell the Jury they might reconsider the matter and either acquit or convict simply, the prisoner being entitled to an acquittal, if the doubt seems to the Jury reasonable. This will often lead to an acquittal.⁶⁷

The verdict and recommendation of a Jury must be considered as a whole : If the Jury specifically find an accused guilty, the verdict cannot be set aside because they express doubt on points of detail.⁶⁸ The recommendation of mercy by Jury along with their verdict of "guilty" does not imply that the Jury did not believe in the accused's guilt at all.⁶⁹ But a Judge ought not to introduce into his directions to the Jury any question as to recommending a prisoner to mercy ; that should be left entirely to the Jury themselves, as the Court has full discretion in passing sentence to give effect to any circumstance that may tell in favour of the accused.⁷⁰ The Judge should not anticipate a recommendation to mercy and make observations to the Jury on the subject ; such observations should be more properly reserved until the Jury had made such recommendation.⁷¹

12. Verdict must be on all the charges, unless otherwise directed by the Court.
S. 303.—

S. 240 Cr. P. C., applies to cases where more charges than one are made against an accused person. If he is convicted on one of these charges before the other charges are tried, such other charges may be withdrawn. But when the evidence bearing on all the charges has been recorded and the pleader heard, it is the duty of the Sessions Judge under S. 297 Cr. P. C to sum up the whole of the evidence and the Jury should then,

67. History of the Criminal Law of England, i, Pp. 561-2.

68. Charlton (1911) 6 Cr. A. R. 119.

69. Hari Mahto (1935) 37 Cr. L. J. 320 : A. I. R. 1936 P. 46 : 160 I. C. 675.

70. Dasee Mosulmany (1870) 14 W. R. 46.

71. Bilash Mosulmany (1870) 14 W. R. 46.

under S. 303, be required to return a verdict on all the charges⁷² or on each one of the heads of charge.⁷³ The accused were found guilty by the Jury under Ss. 366, 380 and 323 I. P. C., and the Judge passed sentence under S. 366 only, the other charges being withdrawn: *Held*, that the charges under Ss. 380 and 323 cannot properly be withdrawn after the accused had been found guilty of them, and that concurrent sentences would have been proper in such a case.⁷⁴ A statement that the verdict is guilty, where there are several charges, is not a sufficient compliance with the Section; a verdict on all the charges should be elicited by questions, and the questions and answers recorded.⁷⁵ If the trial is for murder of two persons and the Jury return a verdict of guilty the Sessions Judge ought to ascertain whether the verdict relates to killing of one or the other or both.⁷⁶ Where there are more than one accused and when there are several charges, it would be a convenient course if the officer of the Court were to take the verdict of the Jury upon each charge separately as against each prisoner. Where the verdict was an incomplete and imperfect verdict, putting further questions to ascertain the real opinion of the Jury upon all the heads of the charge will be justified.⁷⁷ The Jury have to give their verdict on the facts as against each man severally, and they are not like the Judge, in charge of the entire case as a whole. When an accused is to be retried, he must be placed before the Jury upon all the charges which were framed against him, and the High Court has no jurisdiction to uphold the conviction under one Section and to order him to be retried upon another.⁷⁸

The accused was placed on his trial before the Criminal Sessions of the High Court on charges under Ss. 302, 304 and 326 I. P. C. He was defended by Counsel who argued that the case against the accused was one of murder or nothing and the Jury could not convict him of murder on the meagre and unsatisfactory testimony before the Court. Grave and sudden provocation was no part of the defence case. The Judge in charging the Jury laid down the law under S. 302 I. P. C., but not that under S. 304 or the exceptions contained in S. 300. He observed that he did not see that there was any evidence of any of the exceptions provided for in S. 300. The Jury found the accused guilty under S. 302 I. P. C., by a majority of 8 to 1, and the Judge agreeing with the verdict gave judgment in accordance therewith. No verdict was taken on the charges under Ss. 304 and 326 I. P. C. On the case coming up before a Full Bench on a certificate granted by the Advocate General under S. 26 of the Letters Patent, *held* that there was no illegality in not taking the verdict of the Jury on the charge under S. 304 I. P. C. A majority verdict of murder is legal and sufficient; the Judge is not bound to take verdicts on the remaining charges; an unanimous verdict under S. 304 would be inconsistent with the majority verdict and could not legally displace it.⁷⁹

72. Lingo (1886) Rat. 286; Virumandi Thevan (1927) 28 Cr. L. J. 1007; A. I. R. 1928 M. 207; 105 I. C. 831.

73. Berkia (1895) Rat. 746.

74. Nadharya (1886) Rat. 288.

75. Ramprasad (1924) 26 Cr. L. J. 1090; A. I. R. 1926 N. 53; 88 I. C. 178.

76. Berkia (1895) Rat. 746.

77. Eran, Khan (1923) 50 C. 658; 24 Cr. L. J. 838; A. I. R. 1924 C. 47; 74 I. C. 950.

78. Jamiruddi (1912) 16 C. W. N. 909; 13 Cr. L. J. 715; 16 I. C. 523.

79. Upendra (1914) 19 C. W. N. 653, 666, 668, 671, 672 (F. B.); 21 C. L. J. 377; 16 Cr. L. J. 561; 30 I. C. 113.

13. Verdict on offences not charged.—

A person charged and tried for an offence under S. 413 I. P. C., of being a habitual receiver of stolen property, cannot be convicted of an offence under S. 411 I. P. C., not charged.⁸⁰ A verdict not strictly in accordance with any of the charges is illegal, e. g., a finding of house-breaking "to commit an offence punishable with imprisonment" when the intent charged was "to commit theft"⁸¹ or a conviction on a charge under S. 394 I. P. C., when the specific charge was under S. 395 I. P. C.⁸²

But when in a case it is doubtful whether the evidence connecting the prisoner with the offence would establish the offence of murder, abetment of murder by the second prisoner, or of murder committed by some one else, he might have been charged with having committed all or any of these offences, as, indeed, he was of the first two of the above, and, therefore, assuming that there was no charge on the last head (abetment of murder committed by some one else) the Judge might, under S. 237 Cr. P. C., have accepted the verdict returned by the Jury on that head and entered it on the record.⁸³

So, S. 238 Cr. P. C., enables a verdict to be given on some of the facts which are a component part of the original charge, provided that those facts constitute a minor offence, though that offence did not form the subject of a separate charge; e. g., a conviction under S. 325 I. P. C., not charged, when the charge was only under Ss. 149/325 I. P. C., is legal.⁸⁴ Where the Jury acquitted the prisoners on the charge framed, but found certain facts which amounted to another offence and omitted to convict the prisoners of that offence, as provided by S. 457 (now S. 238) Cr. P. C.; *held* that the High Court could, on the case coming before it, find the prisoner guilty of such offence; e. g., under S. 143 I. P. C., when the charges were under Ss. 302/149 and Ss. 326/149 I. P. C.⁸⁵ Thus, there can be verdict of guilty under S. 335 I. P. C., when the charges were under Ss. 304, 325 and 323 I. P. C.⁸⁶ In a trial for robbery, it is competent to the Jury, if they disbelieve the evidence as to the assault (i. e., as to the circumstances of aggravation), to bring in a verdict of guilty of theft. Where, therefore, the Jury gave at first a verdict of guilty of theft, and the Judge refused to receive this verdict, being of opinion that it is illegal as contrary to the evidence, and directed the Jury to reconsider their verdict and the Jury then brought in a verdict of guilty of robbery: *Held*, that the accused was prejudiced and a new trial should be held.⁸⁷ The Jury may ignore the graver charges on which a prisoner is tried and find him guilty of a lesser one, on the evidence.⁸⁸ A Jury, trying an offence triable by a Jury, has authority under S. 238 Cr. P. C., to find as an incident to such trial that certain facts only are proved in the trial, which facts constitute a minor offence, and return a verdict of guilty of such offence, though such minor offence be not triable by a Jury; the Sessions Judge may thereupon record judgment convicting the accused of such minor

80. Baburam (1891) 19 C. 190.

81. *In re Gopal Doss* (1864) 1 W. R. Cr. Lett. 13.

82. Virumandi Thevan (1927) 28 Cr. L. J. 1007 : A. I. R. 1928 M. 207 : 105 I. C. 831.

83. Appa Subhana (1884) 8 B. 200 [referring to Mahaddi (1880) 5 C. 871 : 5 B. L. R. 872.]

84. Mahaddi (1880) 5 C. 871.

85. Harai Mirdha (1877) 3 C. 189.

86. Lukhinarain (1875) 23 W. R. 61.

87. Sakhaut (1865) 2 W. R. 13.

88. Satoo (1865) 3 W. R. 41.

offence though such minor offence be not triable by Jury, although he was not charged with and tried for it with the aid of jurors as assessors.⁸⁹ An appeal from such conviction lies on a matter of law only.⁹⁰ When the Judge agrees with the view that no offence was committed under S. 459 I. P. C., but is of opinion that the accused is guilty of the minor offence under S. 325 I. P. C., though the Jury return a verdict of not guilty, the Cr. P. C. provides no other course than submission of the case to the High Court.⁹¹ Under S. 307 (3) as well as under Ss. 423 and 439 Cr. P. C., the High Court may convict an accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it. It follows, therefore, that in the following cases in which the High Court convicted the accused on charges not framed in the case, the Jury could have convicted him on those charges when trying on the charges framed and placed before them. Thus:—the charge was under S. 304 I. P. C., the High Court on reference convicted under S. 304 A. I. P. C.⁹²; the charge was under S. 397 I. P. C., the High Court on reference convicted under S. 326 I. P. C.⁹³

The charge was under S. 395 I. P. C., the High Court on appeal convicted under Ss. 394/114 I. P. C.⁹⁴ But it has been held that the offence under S. 394 I. P. C., cannot be said to be a minor offence to dacoity under S. 395 I. P. C., and that when the Jury had convicted some accused under S. 394 I. P. C., when they were tried on a charge under S. 395 I. P. C., the conviction was irregular.⁹⁵ On a charge under S. 376 I. P. C., the Jury could convict under S. 376/511 I. P. C.⁹⁶

But the Jury cannot convict on a charge which is quite distinct from and not a minor charge to that framed and placed before them. For instance:—where the charge was under Ss. 302/34 I. P. C., they cannot convict under 302/114 I. P. C.;⁹⁷ when the charges were under Ss. 147 and 304, 325, and 323 read with 149 I. P. C., the Jury could not convict under S. 325 I. P. C.;⁹⁸ where the charges were under Ss. 148, 304/149 I. P. C., and the Jury convicted the accused under S. 326 I. P. C., held that the conviction was illegal;⁹⁹ when the charge was under Ss. 325/149 I. P. C., a conviction by Jury under Ss. 325/34 was illegal.¹⁰⁰

89. Pattikadan (1902) 26 M. 243 : 2 Weir 453.

90. Pattikadan (1902) 26 M. 243 : 2 Weir 463; Per Bhashyam Ayyangar, J. *Contra* per Benson, J.

91. Harilal (1928) 30 Cr. L. J. 793 : A. I. R. 1929 N. 114 : 117 I. C. 284.

92. Walker (1924) 26 Bom. L. R. 610 : 26 Cr. L. J. 211 : A. I. R. 1924 B. 450 : 83 I. C. 995; Ramava Chennappa (1915) 17 Bom. L. R. 217 : 16 Cr. L. J. 305 : 28 I. C. 641.

93. *In re Adabala Muthiyalu* (1912) 13 Cr. L. J. 739 : 17 I. C. 51 (M) [referring to *Anga Valayan* (1898) 22 M. 15; *Krishna Ayyar* (1901) 24 M. 641; and the opinion of Bhashyam Ayyangar, J. in *Pattikadan* (1902) 26 M. 243 : 2 Weir 463]

94. S. P. Ghosh (1915) 16 Cr. L. J. 676 : 30 I. C. 724 (Bur).

95. Virumandi Thevan (1927) 28 Cr. L. J. 1007 : A. I. R. 1928 M. 207 : 105 I. C. 831.

96. Shubrati (1910) 13 O. C. 295 : 11 Cr. L. J. 630 : 8 I. C. 373.

97. Profulla (1922) 50 C. 41 : 24 Cr. L. J. 763 : A. I. R. 1923 C. 453 : 74 I. C. 267.

98. Jatindra (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427; *Dasarath* (1907) 34 C. 325 : 5 Cr. L. J. 424.

99. Madan Mondal (1913) 41 C. 662 : 18 C. W. N. 668 : 15 Cr. L. J. 155 : 22 I. C. 731.

100. Reazuddi (1912) 16 C. C. W. N. 1077 : 13 Cr. L. J. 502 : 15 I. C. 646.

Under the English law it has been held that the option of the Jury to find the lesser offence must depend on the particular circumstances of the case, and that it cannot be said as a matter of law that the Judge must always tell the Jury that they can find the lesser offence.¹⁰¹ He may tell them not to.¹⁰² He should not direct a lesser offence to be found ; that would be taking away from the Jury the decision of the facts.¹⁰³

14. Questioning the Jury—S. 303.—

The Judge may ask the Jury such questions as are necessary to ascertain what their verdict is (S. 303). S. 303 enacts the doctrine of the English law, which is thus stated by Blackburn, J. in *Winsor v. Q* (1866) L. R. 1 Q. B. 289, 303 : "It is the duty of the Judge to take care that the verdict of Jury is not imperfect, and if the Jury have omitted completely to answer the questions left to them, he ought to point out the omission, and have it corrected. When, however, the Judge receives an imperfect verdict and discharges the Jury, recording that imperfect verdict, it is clear that the Judge has made a mistake ; he ought not to have discharged the Jury. But once a good verdict is given, the case is *res judicata*." These words were quoted with approval by Sir W. Erle in delivering the judgment of the Judicial Committee in *R. v. Murphy* (1869) L. R. 2 P. C. 535, 547. Where there was no incompleteness nor ambiguity in the verdict, no misconception suggested of any question of law, no sign of any lurking uncertainty in the Jury's mind such as to justify the Judge in putting further questions, or the finding not inexhaustive as to the facts in issue which go to make up the charge or charges, the Judge, if he asks any questions about the verdict, would exceed the limits of questioning defined in S. 303.¹⁰⁴ The interrogation of the Jury after the delivery of their verdict is highly inexpedient, except as a way to a solution of difficulties which may have embarrassed them ; as when called on for their verdict on the different heads of the charge, they find themselves in difficulties which have to be solved in that way.¹⁰⁵ Where the verdict was an incomplete and imperfect verdict, putting further questions to ascertain the real opinion of the Jury upon all the heads of the charge will be justified.¹⁰⁶ Where the verdict is confused and unintelligible the Judge must obtain from the Jury a proper and correct verdict before accepting the verdict.¹⁰⁷ The Judge ought not to put questions to any of the Jury as to the reasons for the verdict he has given.¹⁰⁸ It is only when it is necessary in order to ascertain what the verdict of the Jury really is, that the Judge is justified under this Section in putting questions to the Jury.¹⁰⁹ That is to say, there must be some

101. Naylor (1910) 5 Cr. A. R. 21.

102. Fitzgerald (1912) 7 Cr. A. R. 264 ; Parrot (1913) 8 Cr. A. R. 193.

103. West (1910) 4 Cr. A. R. 179. See Stevens (1913) 9 Cr. A. R. 132.

104. Dada Ana (1889) 15 B. 452, 466 Per Jardine J. ; Bharmia (1895) Rat. 736 : 6 Bom. L. R. 258 ; 1 Cr. L. J. 265.

105. Criminal Reference No. 36 of 1886 of the Bombay High Court, quoted in Dada Ana (1889) 15 B. 452, 467 ; Sida (1886) Rat. 289.

106. Eran Khan (1923) 50 C. 658 : 24 Cr. L. J. 838 : A. I. R. 1924 C. 47 : 74 I. C. 950.

107. Wilson (1926) 30 C. W. N. 693 : 43 C. L. J. 537 : 27 Cr. L. J. 926 : A. I. R. 1926 C. 895 : 96 I. C. 270.

108. Meajan (1873) 20 W. R. 50. See Notes under heading "*Reasons for the verdict*," ante.

109. Sustiram (1873) 21 W. R. 1 ; Abdul Hamid (1905) 32 C. 759 : 9 C. W. N. 520 : 2 Cr. L. J. 259 ; Abdul Hameed (1912) 36 M. 585 : 15 Cr. L. J. 197 : 22 I. C. 981 ; Dhunum Kaze

doubt in the Judge's mind as to what the Jury mean by the verdict which they have given, and for this there must be some ambiguity in the answer given by the Jury ; it certainly does not mean that the Judge is entitled to question the Jury about the reasons why they have found a particular verdict.¹¹⁰ Where the verdict is clear and not vitiated by any accident or mistake, the Judge has no power either to question the Jury as to their reasons for their verdict under S. 303 or to direct them to amend their verdict under S. 304, even if the Jury had mistaken the law. If such a mistake had resulted in an erroneous verdict, the only course open to the Judge is to disagree with the Jury and refer the case under S. 307 to the High Court. But it is not open to him in those circumstances to address another charge to the Jury on the law and to request them to reconsider their verdict in the light of his legal instructions.¹¹¹ Unless a necessity of this kind truly exists, the questions are not justified in law. No doubt the legislature thought that it would be very dangerous to give the Sessions Judge the power of cross-examining the Jury after they had delivered their final verdict, with a view to show that the conclusions at which they had arrived were not logical or were inconsistent, or in order to provide materials upon which the Judge might be enabled afterwards to dispute the finality of the verdict. But where it appeared to the Judge that there was at the time of delivering their verdict some lurking uncertainty in the minds of the Jury themselves with regard to their verdict, the Judge was justified in putting such questions as to find out what their real verdict is.¹¹² Where a Jury returned a verdict of not guilty of culpable homicide, it was held that the Sessions Judge ought to have required them to find expressly whether or not the accused was guilty of a minor offence.¹¹³ It is a serious irregularity opposed to the fundamental principle and scheme of trial by Jury, if a Judge puts questions to each of the jurors and records their opinions.¹¹⁴ The object of S. 303 is merely to enable the Court to ascertain whether the Jury intended to bring in a verdict of guilty or not guilty.¹¹⁵ It was never contemplated by S. 303 that, on ascertaining that the Jury were not unanimous, the Judge should make minute enquiries to learn the nature of the majority and its opinion, so that he should have the opportunity of accepting or refusing that opinion, as a verdict, according as it coincides with his own opinion or not.¹¹⁶

(1882) 9 C. 53 : 11 C. L. R. 169 ; Chellan (1905) 29 M. 91, 96 : 3 Cr. L. J. 371 ; Edon Karikar (1920) 21 Cr. L. J. 829 : 58 I. C. 829 ; Chirkua (1905) 2 A. L. J. 475 : 2 Cr. L. J. 357 ; Siranadu (1907) 30 M. 469 : 6 Cr. L. J. 373 ; Ali Hyder (1923) 26 Cr. L. J. 856 : A. I. R. 1923 P. 474 : 86 I. C. 712 ; Arunachella (1912) 13 Cr. L. J. 586 : 15 I. C. 1002 (M)

110. Karim Dai (1930) 35 C. W. N. 407 : 33 Cr. L. J. 29 : A. I. R. 1931 C. 636 : 134 I. C. 1133.

111. In re Sundaram (1931) 61 M. L. J. 915 : 32 Cr. L. J. 1276 : A. I. R. 1931 M. 775 : 134 I. C.

986 [referring to Kondiba (1904) 28 B. 412 : 1 Cr. L. J. 331 ; and In re Rama Naicker (1912) 22 M. L. J. 355 : 13 Cr. L. J. 285 : 14 I. C. 669]

112. Sustiram (1873) 21 W. R. 1.

113. Mahadu (1900) 2 Bom. L. R. 334.

114. Abdul Hameed (1912) 36 M. 585 : 15 Cr. L. J. 197 : 22 I. C. 981.

115. Derajitulla (1929) 34 C. W. N. 283 : 31 Cr. L. J. 1150 : A. I. R. 1930 C. 443 : 127 I. C. 79.

116. Dhunum Kazee (1882) 9 C. 53, 61 : 11 C. L. R. 169.

It is not competent to a Sessions Judge to put questions to the Jury where the verdict is general and has been delivered without ambiguity and without incompleteness, and when there is no reason to suspect a misconception or disobedience of the doctrines of law. He is not at liberty to put questions to the Jury after it has delivered its verdict, with a view to bring on record the points on which his opinion is at variance with the Jury.¹¹⁷ Questions put to the Jury by the Judge demanding their reasons for acquitting the accused on the charge on which the Jury have delivered an unanimous verdict, without any uncertain sound, exceed the limits of questioning which the law contemplates.¹¹⁸

Accused were tried by a Jury for offences under Ss. 409, 403, 218 & 477A. I. P. C., and the Jury delivered a verdict of not guilty under Ss. 409 & 403 but 'guilty' under Ss. 218 and 477A. *Held*, that the verdict was sufficiently clear and there was no necessity for any question to ascertain what their intention was.¹¹⁹ In an offence under S. 408 I. P. C., the Judge's asking the Jury their verdict as regards the several items comprising the charge is only a defect in form and does not prejudice the accused.¹²⁰ The Judge is not justified in questioning the Jury after they have given an unanimous verdict under S. 325 I. P. C., which Section was included in the charge under S. 304 I. P. C.¹²¹

15. Questioning the Jury on incomplete Verdicts.—

In a case of a general verdict under S. 304 I. P. C., the Judge should question the Jury to find out, under which part of the Section their verdict should be.¹²² When they were asked the questions, and their answers showed that they had not understood the law under S. 304 and were confused, the Judge rightly questioned them further to find out what their verdict was, and the ultimate unanimous verdict of guilty under S. 303 I. P. C., was held legal and binding.¹²³ The questioning could only be used for the purpose of recording a proper verdict under that Section (S. 304 I. P. C.); to question the Jury with what intention was the act committed was not a proper question to be put under the law; such questioning was not warranted under S. 303 Cr. P. C.; if the Judge thought that the verdict ought to be under S. 302 I. P. C., the proper procedure would

117. Desai Daji (1889) Rat. 442; Naga Tin Gyi (1926) 4 R. 488 (F. B.); 28 Cr. L. J. 213; A. I. R. 1927 R. 68; 99 I. C. 1013; Kondiba (1904) 28 B. 412; Cr. L. J. 331; Chidghan (1902) 7 C. W. N. 135.

118. Bharmia (1895) Rat. 736; 6 Bom. L. R. 258; 1 Cr. L. J. 265.

119. Bilash (1922) 27 C. W. N. 626; 25 Cr. L. J. 343; A. I. R. 1923 C. 647; 77 I. C. 231.

120. Rahim Baksha (1930) 34 C.W.N. 901; 32 Cr. L. J. 321; A. I. R. 1930 C. 717; 129 I. C. 359.

121. Asfar Sheikh (1910) 15 C. W. N. 198; 11 Cr. L. J. 557; 8 I. C. 52.

122. Rego (1895) 19 B. 741, 743; Devji Govindji (1895) 20 B. 215, 217; Chunilal (1898) Rat. 982; Sadek (1933) 61 C. 256 (S. B.); 38 C. W. N. 254; 35 Cr. L. J. 496; A. I. R. 1934 C. 173; 147 I. C. 860.

123. Nga Tin Gyi (1926) 4 R. 488 (F. B.); 28 Cr. L. J. 213; A. I. R. 1927 R. 68; 99 I. C. 1013 [distinguishing Chunilal (1898) Rat. 982]. *But see* Sadek (1933) 61 C. 256 (S. B.); 38 C. W. N. 254; 35 Cr. L. J. 496; A. I. R. 1934 C. 173; 147 I. C. 860.

be to make a reference under S. 307 Cr. P. C. For that purpose it was open to the Judge to put questions to the Jury to find out the reasons for the verdict they had brought in. If, while trying to get a special verdict as regards the particular part of Section 304 I. P. C., the Judge thought that the Jury had not understood the law as to the offence of culpable homicide, it was his duty to explain the law to them; but such summing up should be confined to that offence only and the questions to be put to the Jury should be carefully framed to elicit for them their special verdict only. General questions, the effect of which would be to enable the Jury to travel beyond S. 304 I. P. C., should be avoided.¹²⁴

Where the charges were under Ss. 304, 325, and 326 read with S. 149 I. P. C., and the Jury returned a verdict only under Ss. 147 and 148, adding "none guilty under S. 149", the Judge questioned the Jury to ascertain their verdict on Ss. 304, 325, 326 I. P. C., and after such questioning their finding was "guilty under Ss. 326—149." Held, that this was a legal verdict.¹²⁵

Where the verdict was of grievous hurt and the question of provocation was raised and discussed in the charge, the Judge may, after reading and giving proper explanation of Ss. 325 and 335 I. P. C., ask the Jury which Section was applicable.¹²⁶

In the case of a special verdict, if the finding of the Jury is not exhaustive as to the facts in issue which go to make up the charge or charges, it is competent to the Judge, and is indeed his duty, to put such questions to them as shall elicit a complete finding¹²⁷ (See Notes under the heading, "*Mode of delivering verdict*" ante). In the above case, the accused were being tried on charges under Ss. 330 and 348 I. P. C. The Jury informed the Judge that they did not believe the evidence as to letting down in a well or as to pricking with thorns, but they believed that *Shamanya charta chaparta mara haya chilo* (slight or ordinary slaps were given). The Judge then asked the Jury whether they convicted on either head, and, if so, on which head. The Jury then said that they convicted under S. 330 I.P.C. The High Court found, as a matter of fact, that the Judge asked the question in that form, and not, as suggested by the defence, that the Judge asked the Jury 'whether the case fell under S. 330'. Had the defence suggestion been true, the verdict would have been open to the objection that it was brought about by a sort of suggestion from the Judge that the Jury should give a verdict of guilty under S. 330. As it was found that the question was properly put, the verdict was held to be unimpeachable. In a trial for embezzlement of a certain gross sum within the space of one year, the Jury returned a unanimous verdict of guilty but added that they were not unanimous as to the sum which the accused had embezzled and that the majority were of opinion that it would be "thousand rupees or so" out of the seven thousand and odd rupees mentioned in the charge. Such a verdict is not a simple verdict of guilty or

124. Sadek (1933) 61 C. 256 (S. B.): 38 C. W. N. 254: 35 Cr. L. J. 496: A. I. R. 1934 C. 173: 147 I. C. 860.

125. Eran Khan (1923) 50 C. 658: 24 Cr. L. J. 838: A. I. R. 1924 C. 47: 74 I. C. 950.

126. Bharmia (1895) Rat. 736: 6 Bom. L. R. 258: 1 Cr. L. J. 265.

127. Hurry Prosad (1870) 14 W. R. 59, 62.

not guilty but a special or qualified verdict, to ascertain which it was the duty of the Judge to ask the Jury such questions as were necessary. Where the Judge put no questions to the Jury and he himself was of opinion that the amount embezzled was nearly Rupees five thousand and convicted the accused, it must be held that the conviction was unsustainable ; it would be difficult to say whether really he agreed with the verdict or not when it was not ascertained whether the sum mentioned by the Jury as having been found by them to be the amount embezzled or any part of it was included in the figure which the Judge himself arrived at ; it will also be difficult to know what the verdict really means when no questions have been put to the Jury to ascertain exactly what it was that they found the accused to have embezzled.¹²⁸ It may in certain circumstances be necessary to question the Jury about verdicts which are apparently complete, for instance, in a case in which three known and named persons were charged with dacoity along with two other unknown men, the Jury acquitted one of the three accused and convicted the other two of the offence with which they had been charged. *Held*, that it was quite open to the Jury, while holding that one of the accused who was supposed to have been known to the witnesses was not properly identified, to find that the total number of dacoits was five, but that the Judge should have asked the Jury definitely whether they had considered the possible result of the acquittal and whether they still found that the total number of robbers was five, since it was possible that if the questions had been put, the remaining two accused would have been found guilty only of robbery and received lighter sentence.¹²⁹

In the case of a verdict of the Jury it is not open to the Court to make surmises or conjectures, S. 303 Cr. P. C. providing for the Judge asking the Jury necessary questions in order to ascertain what their verdict is. In a case under S. 489-B I.P.C., the Judge ought not stop merely at recording the verdict about the accused having uttered particular notes at particular places, but should ascertain from them their opinion as to whether the said notes had been uttered with the knowledge of their being forged. When the verdict recorded by the Judge does not contain this, the verdict is inconclusive and incomplete. If the Jury gave their verdict as 'guilty' under S. 489-B, there would have been no ambiguity.¹³⁰

16. Questioning on ambiguous Verdicts.—

Where the verdict of the Jury was confused, and after a discussion which took place in their presence the Judge gave a fresh direction about the various Sections concerned and the Jury retired to reconsider the verdict and gave a second verdict, *held* that there was nothing illegal in the procedure.¹³¹

If the trial is for murder of two persons, and the Jury returned a verdict of guilty, the Judge ought to ascertain by questioning the Jury whether the verdict of guilty of murder

128. Khirode (1924) 29 C. W. N. 54 : 40 C. L. J. 555 : 26 Cr. L. J. 532 : A. I. R. 1925 C. 260 : 85 I. C. 372.

129. *In re Abbas Ali* (1927) 53 M. L. J. 732 : 29 Cr. L. J. 5 : A. I. R. 1928 M. 144 : 106 I. C. 341.

130. *Sat Deo* (1935) 37 Cr. L. J. 182 (O).

131. *Girishchandra* (1931) 58 C. 1335 : 33 Cr. L. J. 135 : A. I. R. 1932 C. 118 : 135 I. C. 443.

related to the killing of one or the other or both.¹³² When the Jury gave the verdict as *Kam dosi* (less guilty), the Judge should ask the Jury what they really meant.¹³³ On a charge under S. 326 I. P. C., the Jury gave a verdict of guilty "but not voluntarily"; the Judge should have asked the Jury what they really meant.¹³⁴ If the Jury give an absurd verdict, the Judge is not bound to interpret it for himself and accept it as a verdict of guilty or not guilty; he may re-charge the Jury on specific points and there is nothing in the Code of Criminal Procedure which prevents him from doing so.¹³⁵ In a trial for murder the Jury after retiring returned the ambiguous verdict, "Guilty of stabbing but without the intention of committing murder". The Judge instead of questioning the Jury under the provisions of S. 303 Cr. P. C., read to them certain parts of Ss. 299 and 300 I. P. C., and sent them back to consider further, with instructions to return a verdict of 'guilty' or 'not guilty'. The Jury returned a verdict of guilty, and the Judge convicted the prisoner and sentenced him to death. *Held*, that the procedure followed was illegal, and the conviction and sentence should be set aside.¹³⁶ Where there is no ambiguity in the verdict the Judge is not bound to question the Jury.¹³⁷ As for instance, when an unambiguous verdict of acquittal under S. 232 I. P. C. and of conviction under S. 235 I. P. C. is given, the Judge cannot question the Jury and after explaining the law direct reconsideration, and the second verdict of guilty under S. 232 is not legal; he should have received the first verdict, and might have proceeded under S. 307 Cr. P. Code.¹³⁸

17. Questioning on absurd verdict.—

See Notes under heading "*Reconsideration of verdict*," *ante*.

The prisoners were charged under Ss. 304 and 326 I. P. C. The Jury unanimously found them not guilty on these charges, but stated to the Judge that they thought an offence had been committed by one of the prisoners but were uncertain as to the Section of the Penal Code applicable to his case. The Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what Section the offence fell. *Held*, that he had failed in his duty, and that he should have asked the Jury what doubts they had as to the crime which had been committed, and should have explained to them the law and informed them what offence the facts would prove against the prisoner if they believe those facts.¹³⁹ Where two alternative common objects were charged in a case of rioting, and the Jury convicted the accused on charges under Ss. 148, 149 and 325/149 I. P. C., without specifying the common object, thus introducing uncertainty into the verdict upon a most

132. *Berkia* (1895) Rat. 746.

133. *Chidghan* (1902) 7 C. W. N. 135.

134. *Khudiram* (1906) 12 C. W. N. 530 (F. B.); 7 Cr. L. J. 362.

135. *Hamid Ali* (1929) 57 C. 61 : 31 Cr. L. J. 761 : A. I. R. 1930 C. 320 : 125 I. C. 97 ; *Rafat Sheikh* (1933) 60 C. 729 : 34 Cr. L. J. 1084 : A. I. R. 1933 C. 640 : 145 I. C. 861.

136. *Hla Gyi* (1905) 3 L. B. R. 75 : 3 Cr. L. J. 1 (F. B.).

137. *Bilash* (1922) 27 C. W. N. 626 : 25 Cr. L. J. 343 : A. I. R. 1923 C. 647 : 77 I. C. 231.

138. *Kondiba* (1904) 28 B. 412, 415 : 1 Cr. L. J. 331.

139. *Jaspath* (1886) 14 C. 164.

material point, the Judge should have put such questions to the Jury under the provision of S. 303 Cr. P. C. as were necessary to make it clear what their verdict was.¹⁴⁰

18. Questioning for purpose of specific finding after a plain verdict.—

Section 303 Cr. P. C., does not permit the questioning of the Jury after a plain verdict to ascertain their specific findings of fact, *e. g.*, the identity of thumb impression.¹⁴¹ Candy, J., however, was of opinion that a Judge is neither expressly permitted nor forbidden to put a question to the Jury after a plain unambiguous verdict has once been delivered, and he observed: "My opinion is that we should do nothing which may tend to hamper Sessions Judges, in the discharge of their onerous and responsible duties, and that, in the absence of any express provision of the law to the contrary, a clear and concise finding of the Jury on the main facts should be allowed, even though a verdict of not guilty has been delivered."¹⁴² Where in answer to a question put by the Judge, the Jury made certain statements as to the reasons for their verdict of acquittal, the High Court refused to consider those statements at all, even though they might be foolish, because the Judge had no right to put the questions which called forth the answers. Where the Jury had returned a plain, simple verdict of 'not guilty' it might be erroneous, but it certainly was not ambiguous; and the duty of the Judge was to receive it and record it, without asking any questions about it.¹⁴³

19. Record of Questions and Answers.—Sub. S. (2) of S. 303.

The actual questions and answers must be recorded and not their substance.¹⁴⁴ The record should contain an accurate account of every communication between the Judge and the Jury; but unless the accused are prejudiced by this omission, the conviction can not be interfered with on that ground.¹⁴⁵ Ss. 303 and 304 Cr. P. Code imply that the Jury are cognizant of the record as made by the Judge of the questions put to them and the answers given by them. It is extremely desirable that such record should be read over to the Jury immediately and this should always be done. To ensure the practice some amendment of S. 303 may be necessary and meanwhile a general order of the High Court will serve a useful purpose.¹⁴⁶

20. Construction of the Verdict.—

The finding of the Jury that, although the accused killed the deceased, the crime was not murder, not because it fell under any of the exceptions allowed by law but because the

140. Wafadar Khan (1894) 21 C. 955.

141. Abdul Hamid (1905) 32 C. 759; 9 C. W. N. 520; 2 Cr. L. J. 259. *See also* the opinion of Jardine, J. in Dada Ana (1889) 15 B. 452 where he discusses the point in an elaborate judgment.

142. *Per* Candy, J. in Dada Ana (1889) 15 B. 452. *See also* Pamanna (1884) 2 Weir 388; Punit Chain (1922) 1922 P. 218; 23 Cr. L. J. 421; A. I. R. 1922 P. 348; 67 I. C. 581.

143. Dhunum Kazee (1882) 9 C. 53; 11 C. L. R. 169. *See also* Siranadu (1907) 30 M. 469; 6

Cr. L. J. 373; Chirkua (1905) 2 A. L. J. 475; 2 Cr. L. J. 357; Sadek (1933) 61 C. 256 (S. B.); 38 C. W. N. 254; 35 Cr. L. J. 496; A. I. R. 1934 C. 173; 147 I. C. 860.

144. Jhubboo Mahton (1882) 8 C. 739.

145. Hari Prasad (1872) 8 B. L. R. 557; 14 W. R. 59, 62.

146. Ifatulla (1931) 58 C. 1138; 35 C. W. N. 456; 32 Cr. L. J. 598; A. I. R. 1931 C. 345; 130 I. C. 884.

accused had no object in killing him is not a legal finding and does not amount to a conviction of culpable homicide not amounting to murder.¹⁴⁷ Where a prisoner charged under Ss. 304, 325 and 323 I. P. C., was found guilty by the Jury under S. 335 I. P. C., *held* that he was not acquitted of grievous hurt but was found guilty of the offence under S. 322 I. P. C., with the extenuating circumstances which would confine the punishment within the limits of S. 335.¹⁴⁸ Where the verdict did not specify the part of S. 304 I. P. C., under which the case fell, and the Judge omitted to ask the Jury about it, the appellate Court presumed that the lighter offence under the second part of S. 304 was meant.¹⁴⁹ The prisoners were arraigned on a charge of culpable homicide not amounting to murder under S. 304 I. P. C. In his charge to the Jury the Sessions Judge omitted to point out that the Section is made up of two parts, and the verdict of guilty which the Jury gave failed to show to which part it was meant to apply; the Judge treating the verdict as found on the first part, sentenced each prisoner to transportation for life: *Held*, that there being nothing in the evidence or the charge to suggest that the offence would have been murder but for one of the exceptions to the definition in S. 300 I. P. C., and as everything pointed to the offence being culpable homicide not amounting to murder and without reference to these exceptions, the verdict must be treated as a finding on the second part of S. 304 and the sentences of transportation for life were, therefore, illegal.¹⁵⁰ When, however, the accused was expressly charged under the first part of S. 304 with the intention to kill and as the Sessions Judge accepted the verdict of the Jury as one of guilty of the offence so charged, the appellate Court presumed that the Jury actually found the accused guilty of that offence.¹⁵¹ The accused was tried on charges of murder and of theft in a dwelling house. At the conclusion of the trial the Jury by a majority of 4 to 1 returned a verdict of not guilty of murder, but guilty of culpable homicide not amounting to murder. The Jury were then asked by the Sessions Judge to consider whether the accused intended to cause death for the purposes of S. 304 and the Jury after this became unanimously of opinion that the accused was guilty of murder and the Sessions Judge accepted this verdict, convicted the accused of murder and sentenced him to transportation for life. *Held*: (1) that the second verdict was merely a reply to the point which the Jury were asked to consider; (2) that the offence proved fell under the first part of S. 304; (3) that the second verdict could not stand, as all that the Judge had asked the Jury to consider was, which of the two classes of offences under S. 304 the majority of the Jury had found the accused guilty of, and they had, therefore, no power to reconsider the whole case and bring in an unanimous verdict of guilty of murder; an erroneous verdict not having been delivered by accident or mistake such as would entitle them to amend it under S. 304 Cr. P. C., and the Judge not having asked them to re-consider the first verdict under S. 302 Cr. P. C.¹⁵² Where the sentence was legal under both

147. Uckoor (1864) 1 W. R. 50. *See also* Gokool (1876) 25 W. R. 36.

148. Lukhinarain (1875) 23 W. R. 61.

149. Kalichurn (1871) 15 W. R. 17; Ameer Khan

(1869) 12 W. R. 35; Amanatulla (1905) 9 C. W. N. ccxxii.

150. Posha Hari (1895) Rat. 735.

151. Ladkya (1890) Rat. 530.

152. Chunilal Vithal (1898) Rat. 982.

parts of S. 304 I. P. C., and the pleader for the defence did not argue that there was no evidence that the accused intended to cause death, the appellate Court refused to interfere with the sentence.¹⁵³ When the charges were under Ss. 302 and 304 I. P. C., and the Jury convicted only under S. 304, the verdict amounted to an acquittal under S. 302. The High Court can, however, on appeal from the conviction under S. 304 I. P. C., take action under S. 439 Cr. P. Code, to alter an acquittal of murder into a conviction thereunder, because in such a case the High Court acts both under S. 423 and S. 439 Cr. P. Code.¹⁵⁴ The verdict of acquittal of an accused under S. 120B read with S. 302 (conspiracy to commit murder) cannot stand in the way of the accused being tried on a charge under S. 302 I. P. C.¹⁵⁵

The accused persons were charged under Ss. 148 and 304/149 I. P. C., and there was no charge under S. 326 I. P. C. The Jury unanimously acquitted them of the charge of rioting and the Judge agreed with them, but the Jury found them guilty under S. 326 I. P. C. The Judge made a reference to the High Court under S. 307 Cr. P. C., on the ground that the verdict under S. 326 was illegal and unwarranted by the evidence and should be altered to one under S. 326/149. *Held*, that the High Court could not consider the question of rioting in respect of which the Judge and the Jury were agreed; *a fortiori* it could not consider any charge made by implication under S. 149, although the verdict of the Jury acquitting the accused of the charge of rioting was based on a misdirection, as the Judge did not explain to the Jury the distinction between civil and criminal trespass before telling them that the complainants had trespassed into the disputed land; that there being no charge under S. 326 I. P. C., independently, there could be no verdict given upon it, and the verdict of the Jury finding the accused guilty under S. 326 I. P. C. was illegal and void and must be set aside.¹⁵⁶

The accused was tried for murder. The first verdict of the Jury was "Guilty of murder under grave and sudden provocation." The Sessions Judge told the Jury that it was their duty, after considering the question of provocation, to return a simple verdict of guilty or not guilty. The Jury, therefore, brought in a second verdict of "Not guilty." The Judge considering this verdict to be perverse, referred the case to the High Court under S. 307 Cr. P. C. *Held*: (1) that the first verdict was a verdict of murder as the Jury did not find that the provocation had destroyed the power of self-control; (2) that the Jury were not bound to find a simple verdict of guilty or not guilty, they might have found a special verdict on findings on matters of fact to which the Judge applies the law; (3) that the direction given to the Jury after the first verdict was wrong, as the case fell under S. 238 Cr. P. Code and although the charge was only one of murder, the Jury had a right to bring in a verdict of

153. Rego (1895) 19 B. 741, 743.

154. On Shwe (1923) 1 R. 436 : 25 Cr. L. J. 247 ;
A. I. R. 1924 R. 93 : 76 I. C. 711.

155. Osman Sardar (1923) 39 C. L. J. 264 : 25 Cr.
L. J. 1048 ; A. I. R. 1924 C. 809 : 81 I. C.
824.

156. Madan Mondal (1913) 41 C. 662 : 18 C. W.
N. 668 : 15 Cr. L. J. 155 : 22 I. C. 731
[following Reazuddi (1912) 16 C. W. N.
1077 : 13 Cr. L. J. 502 : 15 I. C. 648 ; and
Panchu Das (1907) 34 C. 698 : 11 C. W.
N. 666 : 5 Cr. L. J. 427]

culpable homicide, if there was grave and sudden provocation so as to deprive the prisoner of the power of self control.¹⁵⁷ A Judge is entitled to insist on a definite verdict of 'Guilty' or 'Not guilty' when the Jury finds 'Guilty' with qualifying words: A verdict of 'Guilty but not responsible for his actions, being under the influence of drink' is not necessarily a verdict of 'Not guilty.'¹⁵⁸ The two prisoners were tried along with others on charges under Ss. 302/149 and 326/149 I. P. C. Of the others two were acquitted and two found guilty under S. 326. As regards the two prisoners, they were found not guilty on the charges framed, but the Jury, in answer to a question put by the Judge, stated that these two were in company of two of the other prisoners whom they had found guilty, for the purpose of committing riot, but they did not commit it, and further, that they were not present in order to commit grievous hurt on the deceased, but only to punish him to a certain extent. *Held*, that this finding of fact by the Jury amounted to a conviction of an offence under S. 143 I. P. C., and the Sessions Judge should have so told the Jury instead of referring the case to the High Court.¹⁵⁹

The prisoners were charged under Ss. 148, 302/149 and 302/109 I.P.C. The Jury gave a verdict of guilty on the first charge. On the second charge, the Jury found that the deceased was murdered by some persons forming part of that unlawful assembly. On the third charge, the Jury stated that they were present and took part in the fight which caused the death of the deceased. *Held*, that the finding that the deceased was murdered by some members of the unlawful assembly of which all were convicted, without a finding that the murder was in pursuance of the common object or was known to be likely or was abetted, amounts to an acquittal under Ss. 302/149 and 302/114 I. P. C.¹⁶⁰

To constitute an offence under S. 326 I. P. C. the act must have been done voluntarily. This is the very essence of the offence. Where the Jury returned a verdict of "Guilty but not voluntarily" under S. 326; *Held*, that the verdict was in effect one of "Not guilty" and the accused was entitled to acquittal.¹⁶¹

The accused was tried for rape. The Jury gave a verdict that the accused "did the act with consent." The Sessions Judge thereupon, without requiring them to reconsider their verdict, or giving any fresh directions, asked them whether they found the accused guilty or not guilty. The Jury again retired and brought in a verdict of guilty, upon which the Judge sentenced the prisoner to three years' rigorous imprisonment. *Held*: (1) reversing the conviction and sentence, that the first verdict being a special verdict, and there being no real ambiguity about it, the Judge was bound under the provision of the law to record the verdict, and apply the law thereto; (2) that the second verdict could not be sustained, as there was nothing to show that the Judge gave the Jury any fresh directions, or explained to them that a finding that the woman had consented was tantamount to an acquittal.¹⁶²

157. Devji Govindji (1895) 20 B. 215.

158. Moore (1931) 23 Cr. A. R. 138.

159. Harai Mirdha (1877) 3 C. 189.

160. Abdul Razak (1894) Rat. 710.

161. Khudiram (1906) 12 C.W. N. 530 (F. B.) : 7 Cr. L. J. 362.

162. Madhavrao (1874) 19 B. 735.

21. Amendment of Verdict.—S. 304.

S. 304 Cr. P. C., obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the Jury : it has no application where there is no accident or mistake in the delivery of the verdict ; and the mistake lies in the misunderstanding of the law by the Jury. If such a mistake results in an erroneous verdict it can be corrected only by the Judge disagreeing with the Jury and referring the case under S. 307 Cr. P. C.¹⁶³ When a proper verdict is given, the Judge is bound to record it¹⁶⁴ (See Notes under the heading, "*Meaning of the term verdict,*" ante). A Jury is *functus officio* as soon as its verdict is announced to the Court. When, however, by accident or mistake a wrong verdict

is delivered, the Jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended (S. 304 Cr. P. C). Where a verdict is once given, neither the Court nor the Jury can reconsider it except under the above Section.¹⁶⁵ If under S. 304 Cr. P. C. it becomes necessary to question the Jury, the Judge is bound to record the questions and answers.¹⁶⁶ Where after certain witnesses for the defence were examined the foreman of the Jury having asked whether the defence could not cut down the number of the defence witnesses, the defence agreed to dispense with the rest of the defence witnesses except one more, and after that witness was examined the Court being under the impression that the Jury had decided to acquit closed the trial and summed up the case and the Jury returned a verdict of guilty and the Court thereupon ordered the remaining defence witnesses, to be examined and the case was again summed up and the Jury brought in the same verdict : *Held*, that it could not be accepted. The conviction on such verdict must be set aside and retrial held.¹⁶⁷

Where a verdict of acquittal by a majority is by mistake pronounced by the foreman and the mistake is immediately brought to the notice of the Judge by a jurymen, it may be corrected.¹⁶⁸ But the mistake cannot be rectified, if it is not at once brought to the notice of the Judge.¹⁶⁹

Where a Judge questioned the Jury as to the reasons for their returning an unanimous verdict of not guilty and such questioning led two of the jurymen to say that they had been misled as to some of the evidence by the notes of the foreman and that they would like to reconsider their verdict ; *held*, that the case was not one in which a wrong verdict was delivered by "accident or mistake" within the terms of S. 304.¹⁷⁰ The power of amendment of a verdict provided by S. 304, must be exercised before or immediately after the verdict is recorded and cannot be exercised after the jurors have dispersed.¹⁷¹ Having regard to the

163. Kondiba (1904) 28 B. 412 : 1 Cr. L. J. 331.

164. Madhav Rao (1894) 19 B. 735.

165. Lyme (1923) 4 L. 382 : 25 Cr. L. J. 377 : A. I. R. 1924 L. 17 : 77 I. C. 425 ; Mojahur (1900) 4 C. W. N. 683 ; Chunilal (1898) Rat. 982 [distinguishing Sustiram (1873) 21 W.R. 1.]

166. Palavasa Tevan (1911) 1 M. W. N. 190 : 12 Cr. L. J. 140 : 9 I. C. 788.

167. Lyme (1923) 4 L. 382 : 25 Cr. L. J. 377 : A. I. R. 1924 L. 17 : 77 I. C. 425.

168. Vodden (1853) Dears, 229 : 6 Cox C. C. 226 : 23 L. J. M. C. 7.

169. Wooller (1817) 2 Stark. (N. P.) 211 : 6 M. & S. 366 ; Brian Bonham (1912) 13 Cr. L. J. 815 (F. B.) : 17 I. C. 559 (Punj.)

170. Rama Naicker (1912) 22 M. L. J. 355 : 13 Cr. L. J. 285 : 14 I. C. 669.

171. Brian Bonham (1912) 13 Cr. L. J. 815 (F. B.) : 17 I. C. 559. (Punj.)

express provision of S. 304 and the rule of public policy on which that provision is based, generally speaking, after the verdict has been recorded by the Judge and after the Jury have left the box, it would be improper on the part of the Judge to listen to any application to amend the verdict (application for amendment by jurors refused).¹⁷²

Where the verdict is clear and not vitiated by any mistake or accident, the Judge has no power to direct the Jury to amend their verdict under S. 304, even if the Jury had mistaken the law; if such a mistake has resulted in an erroneous verdict, the only course open to the Judge is to disagree with the Jury and refer the case to the High Court under S. 307 Cr. P. C. But it is not open to him, in these circumstances, to address another charge to the Jury on the law, and to request them to reconsider their verdict in the light of his legal instructions.¹⁷³

22. Verdict when to prevail.—Ss. 305 and 306.

There is a distinction as regards the force and effect, between the verdict of a Jury given in a trial before the High Court and that given in a trial before the Court of Session. The number of jurors in a trial before the High Court must be 9, and that in a trial before the Court of Session must be either 5 or 7 or 9, provided that if there be a charge for an offence punishable with death, the number must at least be 7, and if possible, 9 (*See* S. 274).

In a trial before the High Court the verdict of a Jury, to be taken as *the majority verdict*, must be that of at least 6 jurors. In a trial before a Court of Session, the verdict of a Jury, to be taken as *the majority verdict*, may be that of any majority, even of a majority of 3 to 2. If the Judge agrees with the verdict of the majority, he shall, wherever may have been the trial, give judgment accordingly.

Under S. 305 Cr. P. C., the Judge of the High Court is bound to accept an unanimous verdict of the Jury whether he agrees with it or not. It is only when the verdict is not unanimous that it lies with the Judge to take one of the courses specified in the Section.¹⁷⁴ In the *Bangabasi case*, Petheram, C. J. said he would not in that case take any verdict that was not unanimous.¹⁷⁵ A majority verdict agreed with by the Judge has the same legal force as an unanimous verdict. On a verdict of murder being given it is certainly not competent to the Court to take any verdict on the lesser charge of culpable homicide.¹⁷⁶

The word 'opinion' in S. 305 means the 'verdict' and not the grounds or reasons.¹⁷⁷

172. Ifatulla (1931) 58 C. 1138 : 35 C. W. N. 456 : 32 Cr. L. J. 598 : A. I. R. 1931 C. 345 : 130 I. C. 884.

173. In re Sundaram (1931) 61 M. L. J. 915 : 32 Cr. L. J. 1276 : A. I. R. 1931 M. 775 : 134 I. C. 985.

174. Hla Gyi (1905) 3 L. B. R. 75 (F. B.) : 3 Cr. L. J. 1.

175. Jogendra (1891) 19 C. 35.

176. Upendra (1914) 19 C. W. N. 653, 672 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113. Cf. Asfar Sheikh (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52.

177. Chellan (1905) 29 M. 91, 96 : 3 Cr. L. J. 371.

23. Verdict when not to prevail.—

Under S. 305, if a Judge of the High Court disagrees with the verdict of the majority of the jurors, the Jury is at once discharged, and under S. 308 a fresh Jury is called if the accused is to be tried again.¹⁷⁸ See Notes under heading "*Discharge of Jury*," *post*.

If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the Jury (S. 305 (4)). It seems that the time given to the Judge is for the purpose of enabling him to consider whether he should discharge the accused also or call for a fresh jury for retrial. See S. 308 Cr. P. C.

24. English Practice.—

We have already noticed that under the English law the verdict to be of effect must be unanimous and there is no such thing as acceptance of a majority verdict. Sub-cl (4) of S. 305 Cr. P. C., gives some idea as to the practice which prevails in England as to what would have been done when the Jury could under no circumstances come to an unanimous opinion. What extraordinary steps used to be taken in England to secure an unanimous verdict may be gathered from the authorities cited in the case of *Winsor v. Queen*, L. R. (1866) 1 Q.B. 289 (affirmed on appeal in *Winsor v. Queen*, L. R. (1866) 1 Q. B. 390. In that case Cockburn, C. J. said,—

"Our ancestors insisted on unanimity as the very essence of the verdict but they were unscrupulous as to the means by which they obtained it ; whether the minority gave way to the majority or the reverse, to them appeared to have been a matter of indifference. It was a struggle between the strong and the weak, the able-bodied and the infirm, which could best sustain hunger, thirst and the fatigue incidental to their confinement. It was said by the prisoner's Counsel that it was competent to Judges and the duty of the Judges to carry with them in carts a Jury, who could not agree, to the confines of the county where the trial was held or even beyond the county. I doubt whether there is authority for this assertion. The dicta that are to be found in the Books of Assizes have been copied servilely by text-writers and that has given rise to this opinion. I question very much whether such a practice ever existed ; I am sure it has not in modern times. But suppose it to have been so, we, now a days, look upon the principles on which juries are to act, I hope, in a different light. We do not desire that the unanimity of a Jury should be the result of anything but the unanimity of conviction. It is true that a single jurymen, or two or three constituting a small minority, may, if their own convictions are not strong and deeply rooted, think themselves justified in giving way to the majority. It is very true, if jurymen have doubts or weak convictions, they may yield to the stronger and more determined view of their fellows ; but I hold it to be the essence of a jurymen's duty, if he has a firm and deeply rooted conviction either in the affirmative or the negative of the issue he has to try, not to give up that conviction, although the majority may be against him, from any desire to

178. *Tara Nath* (1910) 37 C. 735 : 11 Cr. L. J. 694 : 8 I. C. 653.

purchase his freedom from confinement or constraint, or the various other inconveniences to which jurors are subject. When, therefore, a reasonable time (in that case five hours) has elapsed and the Judge is perfectly convinced that the unanimity of the Jury can only be obtained through the sacrifice of honest, conscientious convictions, why is he to subject them to torture, to all the misery of men shut up without food, drink or fire, so that the minority or possibly the majority may give way and purchase ease to themselves by a sacrifice of their consciences? I am of opinion that so far from the practice of this discharging a Jury being a mischievous one, it is one essential to the upholding of the pure, conscientious and honest discharge of the duties of a jurymen."

Under S. 306, if the Judge does not agree with the verdict, unanimous or of the majority, he should record distinctly the fact.¹⁷⁹ Such an expression "as not agreeing but accepting the verdict" is improper, and the Judge must refer to the High Court if he really disagrees with the verdict of the Jury¹⁸⁰, S. 306 does not impose an obligation on the Judge to refer a case to the High Court except when the conditions set out in S. 307 are satisfied; the disagreement referred to in S. 306 is the same disagreement as impels the Judge to take action under S. 307.¹⁸¹ Ss. 306 and 307 are mandatory. A duty is cast upon the Judge of considering the verdict. He is not like a Judge in an English Court, an instrument for passing a sentence or directing release once a verdict is given. He must make up his mind whether he agrees or disagrees with the verdict, and in the latter case form an opinion on the necessity, for the ends of justice, of submitting the case to the High Court. It may not be correct to say that reference should be made only when the verdict of the Jury is manifestly wrong. When the Sessions Judge forms the view that the prisoner had not committed any offence but the Jury found him guilty, the Judge has no option but to refer the case. Even though the Judge has expressed the opinion¹⁸² that he does not agree with the unanimous verdict of the Jury, still the Judge is not bound to refer the case to the High Court; under S. 307 Cr. P. C., he has a discretion in the matter, and may accept the verdict though he did not agree with it and may pass sentence on the accused.¹⁸³

A Judge cannot, after once accepting the verdict and adjourning for sentence, reconsider his order and proceed under S. 307 Cr. P. C., but must pass sentence.¹⁸⁴

For *Impeachment of verdict*, see Notes under that heading, *post*.

25. Verdict of Jury in a case triable with the aid of Assessors.—

As regards verdict in a case tried by Jury when it should have been tried with the aid of assessors, see Notes in Chapter I *ante*, under the Heading "*Validity of trials wrongly held by Jurors or Assessors.*"

179. Chand (1867) 7 W. R. 6.

180. Ebrahim (1928) 56 C. 473 : 33 C. W. N. 371 : 30 Cr. L. J. 1036 : A. I. R. 1929 C. 415 : 119 I. C. 29.

181. Ramdas (1928) 8 P. 344 : 30 Cr. L. J. 721 : A. I. R. 1929 P. 313 : 117 I. C. 173.

182. Barwick (1932) 13 L. 573 : 33 Cr. L. J. 220 : A. I. R. 1932 L. 345 : 136 I. C. 5.

183. Eran Khan (1923) 50 C. 658 : 24 Cr. L. J. 838 : A. I. R. 1924 C. 47 : 74 I. C. 950.

184. Mojahur (190.) 4 C. W. N. 683. Cf. Bhootnath (1879) 4 C. L. R. 405.

26. Passing of sentence in accordance with the verdict.—

When the verdict of guilty is accepted by the Judge, the Judge shall, "*unless he proceeds in accordance with the provisions of S. 562*", pass sentence on the accused according to law (Sub.-S. (2) of S. 305). The above words in *italics* were inserted by S. 80 of the Amending Act XVIII of 1923. S. 562 gives the Court power to release certain convicted offenders on probation of good conduct instead of sentencing them to punishment or to release them after due admonition. If the sentence of death is passed, the proceeding shall be submitted to the High Court under S. 374 Cr. P. C., and the sentence shall not be executed unless it is confirmed by such Court.

The sentence must be suitable to the offence found in the verdict, though the Judge thinks a grave offence was committed.¹⁸⁵ The fact the Sessions Judge does not agree with the verdict of the Jury convicting the accused, is not a valid reason for his passing a lenient sentence ; by doing so he usurps the function of the Jury ; unless he thinks proper to refer the case under S. 307 Cr. P. C., to the High Court, it is the Judge's duty to pass a sentence adequate to the offence of which the prisoner has been convicted.¹⁸⁶

27. Discharge of Jury, Effect of—S. 308.

S. 308 Cr. P. C., provides that *whenever* a Jury is discharged, the accused shall be detained in custody or on bail and shall be tried by another Jury, unless the Judge considers that he should not be retried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal. In such a case the Judge may give reasons for making such an entry.¹⁸⁷

A Jury may be discharged on several grounds—See Ss. 282 and 283 Cr. P. Code and see Notes under the Heading "*When a new juror shall be added or the Jury discharged and a new Jury chosen before the return of the verdict*" in Ch. III *ante*, and under Heading "*Verdict based on private knowledge of Jury*," *ante*.

In a trial in the High Court if the presiding Judge falls ill after the Jury are sworn in and charges are read and another Judge is appointed by the Chief Justice to preside over the trial, it is not necessary that the Jury should be discharged or that a *de novo* trial should be held.¹⁸⁸

The discharge of the Jury, *after the return of the verdict*, may take place in trials before the High Court, as provided for in S. 305 Sub-sections (3) and (4). As provided in S. 303 quoted above, the accused, in such a case, may be retried by another Jury, or may be acquitted.

185. Azu h-ikh (1917) 21 C. W. N. cxxxix.

186. Eran Khan (1923) 50 C. 658 ; 24 Cr. L. J. 838 ; A. I. R. 1924 C. 47 ; 74 I. C. 950 *See* Per Jackson, J. in Sheikh Gholam (1865) 3 W. R. 29, 30 ; Bissonath (1866) 6 W. R. 6,

187. Premchand (1935) 36 Cr. L. J. 1359 ; A. I. R. 1935 S. 189 ; 158 I. C. 365.

188. Dorabji Pestonji (1926) 29 Bom L. R. 204 ; 28 Cr. L. J. 402 ; A. I. R. 1927 B. 161 ; 101 I. C. 178.

A question arose in a case,¹⁸⁹ whether a Judge of the High Court can discharge a Jury, when the Jury were divided in opinion in the proportion of 6 to 3, without ascertaining what the opinion of the majority was. In that case the accused was being retried, after the discharge, before another Judge and Jury. Objection was taken that at the previous trial, the Judge not having ascertained the opinion of the majority, could not be said either to agree or disagree with the verdict within the meaning of Sub-s. (3) of S. 305. Cr. P. C. It was held that the Court as composed of the Judge and Jury at the first trial must be held to have a legal seizin of the case and no other Court, therefore, could try the case. To get rid of the difficulty a *nolle prosequi* was entered by the Advocate-General, following the precedents in *E. v. Khagendra Nath Banerjee*¹⁹⁰ and *E. v. Olu Mahamad*.¹⁹¹ The above mentioned cases as also the case of *E. v. Jatindra Nath Sen*¹⁹² were reviewed in *Hla Gyi v. E.*¹⁹³ in which the contention that an incomplete trial before a High Court and a Jury amounts to a final disposal of the charge, that the accused cannot be retried and that the old trial could not be mended was overruled.

It is not open to a Judge in an order under S. 308 Cr. P. C., to pass remarks implying the guilt of the accused and suggesting for the consideration of the department concerned that severe departmental action should be taken against the accused.¹⁹⁴

The accused was indicted in the Calcutta High Court Criminal Sessions under five counts which were : (1) murder of one N under S. 302/34 I. P. C., (2) murder of the same under S. 302/114, (3) murder of the same under S. 302/109, (4) murder of one A and (5) culpable homicide of A. The accused pleaded not guilty to all the charges. The Jury unanimously acquitted the accused of the 1st. and 4th. charges and differed as to the other counts in the proportion of 5 to 4. The Judge took the verdict of acquittal on the 1st. and 4th. counts and discharged the Jury under S. 305 Cr. P. C., and ordered a retrial on the three remaining counts under S. 303 Cr. P. C. On the retrial of the accused before a fresh Jury, the accused pleaded not guilty as also *autrefois acquit*, and it was urged in defence : (1) that, as the accused had been acquitted of the charge of murder of A, he could not be tried again for committing culpable homicide on him ; and (2) that as he had been acquitted of an offence under S. 302/34 I. P. C. in relation to the murder of N, he could not be convicted of an offence relating to the same man under S. 302/109 or S. 302/114 I. P. C. *Held* that S. 403 protected the accused only against a trial for murder and any other offence for which a different charge from the one made against him "might have been made", but the offence of culpable homicide for which he was tried again was one of the charges actually made against him, and on terms of S. 403 the first objection failed ; that for the purpose S. 403, the accused was not being tried again but was being tried

189. *Jotindra* (1933) 8 C. W. N. xlviii.

190. (1898) 2 C. W. N. 481.

191. (1902) 7 C. W. N. xxxi.

192. (1903) 8 C. W. N. xlviii.

193. (1905) 3 L. B. R. 75 (F. B.) : 3 Cr. L. J. 1 *See*

Notes under Heading, Judge's discretion in discharging a Jury and choosing a new Jury under the English Law, in Chapter III. ante.

194. *Ahmed Shah* (1929) 23 S. L. R. 397 : 30 Cr. L. J. 877 : A. I. R. 1929 S. 145 : 118 I. C. 195,

on the original indictment, and on his first plea of not guilty, and the duty of the Court was to continue the trial of the accused before another Jury and the process might continue until a verdict is passed on all the counts without the accused being tried again under S. 403 Cr. P. C. S. 303 Cr. P. C., did not affect the construction of S. 403 Cr. P. C.¹⁹⁵

There is no provision in the Code for the discharge of a Jury *by the Sessions Judge after the verdict*. Thus, in a Sessions trial, after the evidence for the prosecution witnesses were closed and the statements of the prisoner read, thinking that the Jury would not be likely to convict upon the evidence that had been given, the Judge asked the Jury if they wished the case to go further and desired to hear the defence of the prisoners. The Jury, misunderstanding the reason of the question, replied that they found prisoners Nos. 3, 4 and 5 guilty and the others not guilty. The Judge thereupon dismissed the Jury and tried the case again with a fresh Jury, who found the 5th and 6th prisoners guilty and acquitted the rest. He differed so completely from this verdict as regards prisoners 5 and 6 that he referred the case to the High Court under S. 307 Cr. P. C., and discharged the others. *Held*, that the action of the Judge in recommencing the trial with the aid of a fresh Jury was not authorised by law, and the proper course was for the Judge to have explained to the Jury that they had misunderstood the purport of the question and to have directed them that it was their duty to hear the defence of the 3rd, 4th and 5th prisoners before expressing an opinion or definitely making up their minds that they were guilty; that the whole of the proceedings at the second trial had been *ultra vires* and must be set aside; that the prisoners 1, 2 and 6 were acquitted by the first Jury after hearing all the evidence for the prosecution, and the verdict will hold good with respect to them. The Sessions Judge was directed to re-summon the Jury originally empanelled and to conclude the trial of the 5th prisoner (the case against the 3rd and 4th having been withdrawn by the Public Prosecutor), the prisoner being allowed to re-summon and examine any witnesses hitherto cited by him for his defence.¹⁹⁶

28. Impeachment of verdict by evidence of jurors or other extraneous evidence.—

It is well established that for the purpose of setting aside a verdict evidence of jurors is not admissible to prove what discussions took place in the jury-box or in the jury-room. It is also well settled that when a verdict is delivered in the sight or hearing of all the Jury their assent is conclusively inferred. But it does not seem to have been decided that if a juror was disqualified by law to take part in the verdict the objection could not be entertained after verdict. The question whether a juror is competent for physical or other reasons to understand the proceedings is not a question which invades the privacy of the discussions in the jury-box or in the retiring room. It does not seek to inquire into the reasons for a verdict. If the alleged defect of the juror could be proved *aliunde* there seems to be no reason why the evidence of the juror himself should not be available either for or against the allegation. The question of assent does not come in, because he was not qualified to assent. The view that no evidence is admissible after verdict to establish the inability of

195. Nirmal Kanta (1914) 41 C. 1072 : 18 C. W.N. 723 : 15 Cr. L. J. 460 : 24 I. C. 340.

196. In re Doraswamy Aiyar (1887) 2 Weir 497,

a juror to understand the proceedings is erroneous. The duty of the Judge to prevent the scandal and perversion of justice which would arise from compelling or permitting an incompetent juror to be sworn is a continuous duty throughout the trial. Finality is a good thing, but justice is better.¹⁹⁷

Sworn statements of jurors and evidence of admissions made by them as to the mode in which their verdict has been arrived at are inadmissible, but the evidence of other persons as to the same is received.¹⁹⁸

The Court will not take notice of a letter written by a juryman after a trial to the trial Judge.¹⁹⁹

Where a juror had conversation with witnesses for the prosecution before the summing up; *held*, that that was improper but as there was no prejudice the verdict could stand.²⁰⁰

Trial by Jury would become useless and farcical if the question of the competency of a particular juror were made to depend upon opinion that he was not able to understand the summing up of the Judge; whether he understood it sufficiently or not is a matter on which different persons acquainted with the juror might form different opinions (The contention in this case was based upon the affidavit of certain persons who were of opinion that the juror could not have followed the charge.)²⁰¹

The Court of Criminal Appeal in England has, in a case where the accused appealed against a conviction for felony on the ground that two of the Jury did not understand the proceedings in English, being Welshmen, *held*, that as no objection was taken at the opening of the trial when the jurors took the oath in English, the affidavits of the jurors filed after the trial could not be looked into, and that as the verdict had been delivered at the sight and hearing of all the Jury without protest, their assent to it should be conclusively inferred.²⁰² But the Judicial Committee has definitely disagreed with this decision in the case of *Ras Behari Lal*, noted *ante*.

197. *Ras Behari* (1933) 60 I. A. 354 : 38 C. W. N. 11 : 58 C. L. J. 300 : 1933 A. L. J. 893 : 65 M. L. J. 513 : 35 Bom. L. R. 1087 : 12 P. 81 : 34 Cr. L. J. 843 : A. I. R. 1933 P. C. 208 : 144 I. C. 911 [referring to *Ellis v. Deheer* (1922) 2 K. B. 113 : 91 L. J. K. B. 937 : 127 L. T. 431 : 86 J. P. 159 : 38 T. L. R. 605, Ex. parte *Morris* (1907) 72 J. P. 5, *Mansell v. R g* (1857) 8 El. & Bl. 54 at P. 8 : 27 L. J. M. C. 4, and disagreeing with *R. V. Thomas* (1933) 102 L. J. K. B. 646].

198. *Harkumar* (1913) 40 C. 693 : 17 C. W. N.

787 : 14 Cr. L. J. 392 : 20 I. C. 216 [referring to *Queen v. Warbarton* (1835) 1 B. & P. 326 : 127 Eng. R. p. 489, *Straker v. Graham* (1839) 4 M. & W. 721 : 51 R. R. 783 ; *Burgess v. Langley* (1841) 5 M. & G. 722 : 134 Eng. R. p. 753 ; *Queen v. Murphy* (1869) L. R. 2 P. C. App. Cas. 535].

199. *Melik* (1914) 11 Cr. A. R. 100.

200. *Twiss* (1918) 13 Cr. A. R. 177.

201. *Bhavanrao Vithalrao* (1904) 6 Bom. L. R. 533 : 1 Cr. L. J. 598.

202. *Thomas* (1933) 102 L. J. K. B. 646,

CHAPTER IX

H.—Conclusion of Trial in cases tried with Assessors—S. 309.

S. 309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and then shall require each of the assessors to state his opinion orally on all the charges on which the accused has been tried, and shall record such opinion, and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

(3) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 552, pass sentence on him according to law.

List of Headings.—

1. Distinction between a trial by Jury and a trial with the aid of assessors.
2. Amendment of the Section.
3. Cases tried with the aid of assessors.
4. The Court may sum up the evidence.
5. Whole of the evidence must be placed before the assessors.
6. The Judge shall require each of the assessors to state his opinion orally.
7. An assessor's opinion must be taken on all the charges on which the accused has been tried.
8. Conviction for an offence not charged.
9. The Judge shall record such opinion.
10. And for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are.
11. The Judge shall then give judgment.
12. The Judge in giving judgment is not bound to conform to the opinion of the assessors.
13. If the accused is convicted, the Judge shall pass sentence.

1. Distinction between a trial by Jury and a trial with the aid of assessors.—

When after the choosing of jurors or assessors, the trial in the Court of Session actually commences, there is no difference in the procedure beginning with the opening of the case for the prosecution and ending with the summing up of the case for the defence or with the prosecutor's reply, when he is entitled to do so. (Ss. 286—295) The final order of acquittal or conviction and sentence rests also with the Judge presiding over the Court of Session, whether the trial is held by a Jury or with the aid of assessors. The main distinctions are the following :—

(1) In a case tried by Jury, the Judge is *bound* to charge the Jury, summing up the evidence for the prosecution and defence, and laying down the law by which the Jury are to be guided ; which, in a case tried with the aid of assessors, the Judge is not bound to do : he *may* sum up the evidence only for the prosecution and defence to help the assessors in forming their individual opinion on the facts of the case. The assessors are not necessarily required to apply the law to the facts, and hence the Judge is not required to lay down the law for their guidance.

(2) In a case tried by Jury, the Judge must take the *collective opinion of the Jury as a body*—whether unanimous or of the majority—as to whether the accused is guilty or not guilty, and this collective opinion has been specialised by the term “verdict”, and there is nothing to prevent it from being delivered in writing, instead of orally, by the foreman of the Jury. In a case tried with the aid of assessors, there is no such person as the foreman of the assessors ; the Judge is required to ask *each of the assessors* separately to state his opinion orally.

(3) The most important distinction is that in a Jury trial, the final judgment of acquittal or conviction rests with the Jury ; the Judge is bound to pass orders in accordance with their verdict, and the only remedy in case he does not agree with the verdict is to refer the case to the High Court under S. 307 Cr. P. C. While, in a trial with the aid of assessors, the final judgment rests with the Judge and he is not bound to conform to the opinions of the assessors even if they agree, unanimously or by a majority, in their opinions. In the former case, the trial ends with the recording of the verdict ; in the latter case, the trial does not end with the record of the opinion of the assessors, but with the judgment of conviction and sentence, acquittal or discharge passed by the Judge.¹

(4) In trials by Jury, the Judge need not write a judgment, but shall record the heads of the charge to the Jury ; while in trials with the aid of assessors, the Judge shall write out a judgment in conformity with the provisions of S. 367 Cr. P. C.

(5) An appeal by a convicted person, on a trial held by a Jury, lies on a matter of law only ; while, on a trial held with the aid of assessors, the appeal lies on a matter of fact as well as on a matter of law (S. 418).

2. Amendment of the Section.—

The Section has been amended by Act XVIII of 1923, S. 82,—(a) by the insertion of the words “on all the charges on which the accused has been tried” after the word “orally” in clause (1) ; (b) by the insertion of words “and for that purpose.....recorded” at the end of the said clause ; and (c) by the insertion of the words “unless he proceeds in accordance with the provision of Section 562” after the word “shall” in clause (3).

3. Case tried with the aid of assessors.—

A trial before a Court of Session is ordinarily with the aid of assessors. It is only when an order has been passed by the Local Government under S. 269 Cr. P. C., that the trial would be by Jury. Under Ss. 234 to 239 Cr. P. C., a Sessions Judge has got a discretion to try simultaneously cases regarding different offences committed in the course of the same transaction of which may be triable by Jury and others with the aid of assessors. In such cases the procedure laid down in Sub-s. (3) of S. 269 must be followed. See Chapter I, *ante*.

A conviction of a prisoner on a plea of guilty before a Court of Session is valid,

1. Chinna (1899) 23 M. 151 : 2 Weir 747 ;

Paltua (1900) 23 A. 53, 54, 55 : 20 A. W. N. 192.

although there were no assessors [See S. 271 (2) Cr. P. C. ; and *Srikant Charal* (1868) 2 B. L. R. 23 (F. B.).

4. The Court may sum up the evidence.—

There was no provision in the Codes of 1861 and 1872 for such summing up. This was because, in the opinion of Jackson, J. the assessors were members of the Court and were to give their opinions orally for the consideration of the Judge, who afterwards gave his decision, while in the case of a Jury who had the sole decision on the facts it was the duty of the Judge to sum up and, when necessary, to direct them.² But Norman, C. J. in a later case,³ observed that because the Code was silent as to such a summing up, it did not follow that nothing of the sort was to take place. He said—"In a case like the present, where a prisoner was being tried on seventeen charges, where the evidence was very voluminous** we think that a Judge sitting with assessors would have failed in his duty, or at least showed a want of sound discretion, if he had not indicated the matters necessary to be established by proof in order to convict the prisoner of the offence or offences charged. With the full notes of the evidence and all the documents before him, we should have been surprised if we had found that the Judge had failed to assist the assessors by reminding them of the result of the evidence, and pointing out the bearing of the several parts of such evidence on the questions to be considered.***Mr. Ghose (Counsel for the defence) urged that the object of appointing assessors is to assist the Judge—not for the Judge to assist or by such assistance to influence the assessors. But the real object of appointing assessors is to assist the Court, and the discussion and the statement of points by a Judge sitting with assessors cannot be said to be otherwise than in furtherance of the object of getting the best assistance for the proper adjudication of the case". Probably the above observations of Norman, C. J. influenced the Legislature while enacting the Code of 1882 to introduce for the first time the above provision giving a discretion to the Judge to sum up the evidence. The object is to enable the Sessions Judge in long or intricate cases to place the evidence in an intelligible form so as to assist the assessors in arriving at a reasonable conclusion.⁴ But the Judge should not take the opportunity of expressing his opinion in emphatic terms on every single matter put in evidence, for that would have the effect of embarrassing the assessors in coming to an independent opinion of their own in the face of the very decided opinion expressed by the Judge.⁵ It is of importance that the opinions of assessors, whether good, bad or indifferent, wise or foolish, should be recorded or they are expressed without any influence from the Judge except such as may be reasonably exercised in the course of his summing up.⁶ S. 309 gives a discretion to the Judge to sum up if he thinks necessary.⁷

2. *Jaga* (1869) 11 W. R. 69.

3. *Ameeroddeen* (1871) 15 W. R. 25 : 7 B. L. R. 63.

4. *Shadulla* (1883) 9 C. 875 : 12 C. L. R. 506 ;
Tirumal (1901) 24 M. 523 : 2 Weir 340, *Per*
Bhashyam Ayyangar, J.

5. *Shadulla* (1883) 9 C. 875 : 12 C. L. R. 506.

6. *Tika Ram* (1886) 6 A. W. N. 22.

7. *Nazimuddi* (1912) 40 C. 163 : 13 Cr. L. J. 497 : 15 I. C. 641.

But though the Code has provided for the summing up of evidence, if the Judge thinks it necessary, it does not provide for the recording of the summing up by the Judge, similar to that as provided for recording the heads of the charge to the Jury in S. 367 Cr. P. C. The reason may be stated in the words of Norman, C. J. :—"In cases of trial by Jury, the summing up is all-important, because there is no appeal from the decision of a Jury. In order to know what is the proposition which the Jury have affirmed—what it is that they have really decided in finding a verdict of guilty—it is generally necessary to look to the question left to them by the Judge in summing up. And therefore, in order that it might appear whether the conviction is legal and proper, it was necessary in the Code of Criminal Procedure to provide that in trials by Jury a statement of the Judge's directions should form part of the record. ***In trials before a Judge sitting with assessors there is an appeal on the facts. The Appellate Court can examine the grounds of the finding of the Judge and assessors".⁸ But if such summing up is recorded, it must be by the Judge himself; and if he be incapable himself of recording the heads of the summing up, he should avail himself of the services of some Court Officer, or direct it to be done by some independent person and not by the pleader for the prosecution.⁹

After such summing up, retiring of the assessors for consultation and opinion is not necessary.¹⁰

5. Whole of the Evidence must be placed before the Assessors.—

No legal conviction can take place unless the opinion of the assessors is taken on the whole of the evidence in a case.¹¹ Where the assessors had no opportunity to consider a piece of evidence, which was recorded after the assessors were discharged, and the Additional Sessions Judge based his judgment mainly on this piece of evidence : *Held*, this amounted to a material irregularity which was not covered by S. 537 Cr. P. C.¹² In the above case it was observed :—"In only one instance is a Court of Session authorised to record evidence in the absence of Jury or assessors, and that is when additional evidence is called for by the Appellate Court (*Vide* S. 428 Cr. P. C.). But in the present case the evidence to prove the statement made by the deceased was recorded before a tribunal which had no authority to record it. It was in fact evidence recorded *coram non jndice*. A Sessions Judge has no power to take evidence after the assessors have been discharged, and if he does so, the trial is vitiated.¹³ The assessors are equally entitled with the Judge to express an opinion on the weight of any matter affecting the result.¹⁴ The assessors cannot act on their own knowledge, their opinion must be based only on the evidence given on the trial (See S. 294 Cr. P. C.). A

8. Ameeroddeen (1871) 15 W. R. 25 ; 7 B. L. R. 63.

9. Shadulla (1883) 9 C. 875 ; 12 C. L. R. 506.

10. Tirumal (1901) 24 M. 523, 537 ; 2 Weir 340.

11. Bhugwan Lall (1871) 15 W. R. 3.

12. Ram Lal (1893) 15 A. 136 ; 13 A. W. N. 50.

13. Jaisukh (1920) 43 A. 125 ; 22 Cr. L. J. 127 ; 59 I. C. 559.

14. Sagal Samba (1893) 21 C. 642, 664. *See also* Ashootosh (1878) 4 C. 483 (F. B.), 486 ; 3 C. L. R. 270 ; Gorachand (1886) B.L.R. Sup. Vol. 443, 448.

Sessions Judge should not import into his judgment the opinion of an assessor derived from personal knowledge and unsupported by evidence on record.¹⁵

Under S. 166 of the Evidence Act, the assessors may put any question to the witnesses, through or by leave of the Judge, which the Judge himself might put and which he considers proper.

If a Sessions Judge should think it necessary to visit the place of the offence under trial, he should give notice to the parties and the assessors. He should not go without such notice, and after the trial has been completed by the delivery of the opinion of the assessors.¹⁶ Under S. 309 (2) Cr. P. C., a Sessions Judge is bound to give judgment after the assessors have given their opinions and he is not competent to take into account his observations of the locality where the crime was committed and which was visited by him alone after the assessors had given their opinions.¹⁷ In this case the appellate Court eliminated the portion of the judgment relating to his visit to the spot and the Judge's conclusions therefrom and decided the case on other materials.

After a trial for murder had closed and the opinion of the assessors had been given, the Sessions Judge reserved judgment. But, for the purpose of obtaining further opinion of the Civil Surgeon about the mental state of the accused, he had private interviews and correspondence with and afterwards prepared a judgment incorporating the views of the Civil Surgeon. *Held* : that the action of the Sessions Judge was illegal and that he ought to have under the circumstances adjourned the case and examined the Civil Surgeon in the presence of the accused and the assessors.¹⁸

As to local inspection by the assessors, see S. 293 Cr. P. C. In a case, the assessors desired to view the scene of the alleged offence; the Judge ordered that certain of the witnesses should attend with the assessors and he impressed upon the assessors the necessity of orally examining the witnesses, if they desired to do so, in the presence of the accused, who would be present there. *Held*, that such a procedure was not warranted by law and that the Judge cannot delegate his own high function to the assessors.¹⁹

6. The Judge shall require each of the Assessors to state his opinion orally.—

This is mandatory; and subject to S. 289 (2) and (3), if the Judge decides a case without taking their opinion at all according to S. 309 Cr. P. C., the trial is virtually without their aid, and the finding and sentence cannot be said to have been passed by a Court of competent jurisdiction, and S. 537 Cr. P. C., does not apply.²⁰ Where four persons who were under trial along with others were acquitted by the Sessions Judge at the termination of the evidence for the prosecution on the ground that the evidence of identification was

15. Ram Churn (1875) 24 W. R. 28.

16. Oudh B. hari (1877) 1 C. L. R. 143.

17. Deiyaa (1916) 17 Cr. L. J. 500; 36 I. C. 468 (Bur).

18. Jia Lal (1889) 9 A. W. N. 181.

19. Chutterdharee (1866) 5 W. R. 59.

20. Tirumal (1901) 24 M. 523, 536; 2 Weir 340 [following Matam Mal (1874) 22 W. R. 34, Munna (1888) 10 A. 414; and dissenting from In re Narain Das (1878) 1 A 610.

unworthy of belief, Prinsep. J. observed that, under such circumstances, it was the duty of the Judge, before passing judgment, himself to ask for and record the opinions of the assessors on that evidence ; it was not a case of 'no evidence' as the Judge thought, the fact being that there was evidence which the Judge thought unworthy of belief.²¹ A trial is altogether vitiated if the assessors are not asked and are apparently not allowed to give an independent opinion on the case.²² Wherever there is evidence, which though in the opinion of the Judge is unsatisfactory, untrustworthy or inconclusive, the Judge is bound to take the opinions of the assessors on the case ; otherwise he might terminate any trial before him without consulting the opinions and using the judgment of the assessors by finding that the evidence was not to be believed, and by directing a verdict of acquittal to be recorded. It is not the intention of the Legislature that the Sessions Judge should have such a power, or that assessors might be confined to the function of giving their opinions on the evidence in those cases only in which the Judge was inclined to believe the evidence for the prosecution ; a Court acting in this way acts without jurisdiction, and its order in discharging the accused is illegal.²³ Where the accused pleaded not guilty and the trial proceeded on that footing, and at the close of the prosecution evidence the accused, when asked, admitted the offence, and the Judge thereupon without taking the opinion of the assessors found her guilty on her own admission and sentenced her : *Held*, reversing the conviction and sentence, that it was the duty of the Judge to proceed with the trial as provided in S. 309 Cr. P. C., and hear the defence and take the opinion of the assessors in the case.²⁴

In order to comply with the provisions of S. 309, the Sessions Judge should record at the time in writing the opinion actually given in his own words by each of the assessors ; the omission to do so is an irregularity.²⁵ The Judge should not receive the opinions of all the assessors combined, as delivered through one of them whom he thus regards as the foreman of a Jury.²⁶ But allowing the assessors to give their opinions in the form of a joint statement instead of separately as required by S. 309 is an irregularity covered by S. 537, in no way prejudicing the accused or vitiating the proceedings.²⁷ The fact that one of the assessors was wrongly allowed to take part in the trial and give his opinion will not vitiate the opinion of another assessor validly given.²⁸ Each assessor is an entity acting independently of his fellow assessors ; his opinion must be accepted as his own, whatever were the considerations which weighed in forming it, and no evidence is admissible of its having been influenced by that of his co-assessors or any other person or circumstances. The Judge must allow him to express his own opinion independently, in his own words, on the whole case.²⁹

21. Shadulla (1883) 9 C. 875 : 12 C. L. R. 506.
See Vajiram (1892) 16 B. 414.

22. Nazimuddi (1912) 40 C. 163 : 13 Cr. L. J. 497 : 15 I. C. 641.

23. Munna (1888) 10 A. 414.

24. Bai Nani (1905) 7 Bom. L. R. 731 : 2 Cr. L. J. 609 ; Sivaga (1903) 2 Weir 334.

25. Fatu Santal (1921) 6 P. L. J. 147 : 22 Cr. L. J. 417 : 61 I. C. 705.

26. Shadulla (1901) 9 C. 875 : 12 C. L. R. 506.
See also 95 P. R. 1887 ; In re Muppidi (1895) 2 Weir 493.

27. Hasan Khan 41 P. R. 1887.

28. Tirumal (1901) 24 M. 523, 537 : 2 Weir 340 ;
Messeruddin (1902) 6 C. W. N. 715.

29. Nazimuddi (1912) 40 C. 163 : 13 Cr. L. J. 497 : 15 I. C. 641.

In a trial on charges partly triable by assessors and partly by Jury, the opinion of all the jurors as assessors should be taken and not merely of two of them, with respect to the charges triable only by assessors ; and the omission is not an irregularity under S. 537.³⁰ A majority verdict of acquittal on charges triable by jurors as assessors cannot be treated as the 'opinion' of assessors ; their individual opinions not having been disclosed.³¹ (See Notes in Ch. I *ante* under S. 269 (3) Cr. P. C.). The circumstances that the accused is charged in the same trial with another offence triable by Jury and that the Judge disagrees with the verdict of the Jury on that charge and desires to make a reference to the High Court under S. 307, do not absolve the Sessions Judge from complying with the requirements of S. 309 as regards the offence tried by him with assessors.³²

Such opinion should be oral and not in writing, nor in the form of a judgment under S. 367.³³ Even if the assessors' opinions were given in writing and not orally, that would not be a ground for interference with the convictions, as it could not be said that any such aberration from the precise directions of the Code led to any miscarriage of justice.³⁴

After once summing up the case to the assessors and taking their opinions, the Judge cannot re-open the matter and press upon the attention of the assessors a part of the accused's confession which appeared damaging, in order to induce them to revise their opinions ; such a procedure was held to be illegal.³⁵

7. An Assessor's opinion must be taken on all the charges on which the accused has been tried.—

The words "on all the charges on which the accused has been tried" were inserted by the Amending Act XVIII of 1923, S. 82. See the similar provision, contained in S. 303, in the case of a Jury trial, and compare the notes under that Heading in Chapter VI, *ante*. The words "on all charges" have been interpreted to mean that distinct opinion on each charge must be taken and recorded ;³⁶ and the failure of a Sessions Judge to do so vitiates the trial.³⁷

It may be difficult in all cases for an assessor to give his opinion on all the charges, involving as they do the application of law to the facts,—sometimes a very difficult problem,—without instructions from the Judge as to the law to be applied on the findings of fact. S. 309 does not contain any provision requiring the Judge to lay down the law by which the assessor

30. Ramakrishna (1903) 26 M. 558 ; 2 Weir 333.

31. Bhootnath (1879) 4 C. L. R. 405, 409.

32. In re Kambala (1919) 36 M. L. J. 452 ; 20 Cr. L. J. 352 ; 50 I. C. 832 ; Chanbasappa (1931) 33 Bom. L. R. 1571 ; 33 Cr. L. J. 172 ; A. I. R. 1932 B. 61 ; 135 I. C. 495.

33. Lalit Chandra (1911) 39 C. 119 ; 13 Cr. L. J. 433 ; 15 I. C. 65.

34. Begu (1925) 52 I. A. 191 ; 30 C. W. N. 581 (P. C.) ; 41 C. L. J. 437 ; 27 Bom. L. R. 707 ; 48 M. L. J. 643 ; 6 L. 226 ; 23 A. L. J. 636 ;

2 O. W. N. 447 ; 26 Cr. L. J. 1059 ; A. I. R. 1925 P. C. 130 ; 88 I. C. 3.

35. Tika Ram (1886) 6 A. W. N. 22.

36. Shevanti (1928) 29 Cr. L. J. 561 ; A. I. R. 1928 N. 257 ; 109 I. C. 497 [following Matam Mal (1874) 22 W. R. 34.]

37. Lal Behari (1934) 11 O. W. N. 839 ; 35 Cr. L. J. 1066 ; A. I. R. 1934 O. 354 ; 150 I. C. 509. See also Bhikhari Singh (1934) 13 P. 729 ; 36 Cr. L. J. 17 ; A. I. R. 1934 P. 561 ; 152 I. C. 282.

is to be guided ; it confers on the Judge a discretion to sum up the evidence only. An illustration of the difficulty that arises can be found in *Q. v. Matam Mal.*³⁸ In that case the accused was committed on a charge of culpable homicide not amounting to murder ; but the Sessions Judge added a charge of murder and the accused was tried under the said two charges. After the close of the case for the prosecution the Judge recorded the opinions of the two assessors, which were to the effect that the accused struck the deceased (his wife) with a *dao* but did so in consequence of the deceased having abused him. Thus the assessors had not given any opinion as to whether the prisoner had committed the offence of murder or any offence at all, and in the judgment delivered by the Judge he did not advert to the opinion of the assessors. The High Court held that the assessors should give a definite opinion whether the prisoner was guilty of either of the offences charged, and, if so, of which of the charges preferred against him, and that the Judge in delivering judgment, should give it with advertence to the opinion of the assessors, and the case was sent back for that purpose. Now, it is submitted that in view of the fine distinction made by the law as to what would constitute murder and what culpable homicide not amounting to murder, it would be difficult for the assessors to come to any definite conclusion without assistance from the Judge. And this submission is supported by the observations made by the Patna High Court in the case of *Sunder Buksh v. E.*³⁹ There it was observed that in a case of rioting, where the dispute arose over the possession of a piece of land and the Crown admitted the possession of the accused and the accused themselves urged the plea of private defence, it was the duty of the Sessions Judge to explain to the assessors the legal aspect of the plea put forward by the accused and to direct their attention to it by putting specific questions to them on the point, involving as it does mixed questions of fact and law ; and it is not sufficient simply to put general questions to the assessors such as 'whether the accused are guilty or have committed rioting'. No doubt the difficulty may be solved to some extent by the provision, also newly added by the Amending Act XVIII of 1923, empowering the Judge to ask the assessors questions to ascertain what their opinions really are. [See Notes under the Heading "*And for that purpose...recorded,*" *post.*]

Where an acquittal takes place on account of the Public Prosecutor withdrawing under S. 494 Cr. P. C., from the prosecution with the consent of the Court, the opinions of the assessors need not be recorded, as the acquittal is a matter of right to the accused whatever the opinions of the assessors might be.⁴⁰ Where the prisoner has pleaded not guilty and the Public Prosecutor does not offer evidence, the Judge ought to instruct the assessors that they are bound to find the prisoner not guilty.⁴¹

8. Conviction for an offence not charged.—

The accused was charged with and tried for the offence of abetment of murder. The opinions of the assessors were that he was not guilty of the offence charged. The trial Judge accepted the opinions, but convicted the accused of causing disappearance of the evidence

38. (1874) 22 W. R. 34.

39. (1918) P. 359 : 19 Cr. L. J. 983 : 48 I. C. 163.

40. *Chenbasapa* (1886) Rat. 307.

41. (1869) 4 M. H. C. R. App. 39.

of the offence, under S. 201 I. P. C. *Held*, reversing the conviction and sentence, that it was imperative for the Judge to take the opinions of the assessors on the charge relating to S. 201 I. P. C.⁴² This case has been held in a later case to be no longer good law. Thus, where the accused was acquitted of an offence under S. 302 I. P. C., and on appeal preferred by the Government it was found that the accused was guilty of an offence under S. 193 I. P. C., and there was no prejudice to the accused : *Held*, that acting under S. 423 (1) (a) Cr. P. C. the High Court could avail itself of the provisions of S. 237 Cr. P. C., and convict the accused for the lesser offence without ordering a retrial. *Held* also, that the mere fact that the assessors' opinions were not taken on the minor offence was immaterial.⁴³ The above case further held that the High Court is not confined to the grounds of appeal by the Crown which prayed for conviction only under S. 302 I. P. C., thus dissenting from *Ranade, J. in Q. E. v. Karigowda* (1894) 19 B. 51 and approving *Kauromal v. E.* (1924) 25 Cr. L. J., 1057 (S.). A person can be charged with the offence of murder and, in the alternative, with the offence of causing evidence to disappear with the intention of screening the offender, Ss. 201, 202.⁴⁴ A person cannot be convicted of an offence with which he has not been charged but which the evidence shows he has committed, in a case tried with the aid of assessors wherein the opinions of the assessors have not been taken with regard to such offence.⁴⁵ The accused was committed on a charge of murder and tried with the aid of assessors. The finding of the assessors was recorded, they were discharged and the accused acquitted. Suddenly the Judge found that there is evidence, in his opinion, to convict on a charge of culpable homicide not amounting to murder. The assessors were recalled, the Judge altered the charge to culpable homicide not amounting to murder and convicted the accused on that charge. *Held*, that the conviction was illegal.⁴⁶

It has, however, been held that where the accused is convicted of an offence with which he was not charged under S. 239 Cr. P. C., the Judge is not bound to require the assessors to state their opinions as there is no charge. Where the Public Prosecutor tells the assessors that there is a clear case against the accused under S. 395 or S. 402 I. P. C., and the majority of the assessors find the accused guilty of theft, it cannot be said that the Judge did not take the opinion of the assessors. The irregularity, if any, does not prejudice the accused.⁴⁷ Where the accused is charged with a major offence and convicted of a minor offence, the judgment must show clearly that the Judge explained to the assessors that the accused might be guilty of the minor offence and took their opinion on it.⁴⁸

42. Appaya (1923) 25 Bom. L. R. 1318 : 26 Cr. L. J. 394 : A. I. R. 1924 B. 246 : 84 I. C. 938.

43. Ismail (1928) 52 B. 385 : 29 Cr. L. J. 403 : A. I. R. 1928 B. 130 : 108 I. C. 501 [following Begu (1925) 52 A. I. 191 : 30 C. W. N. 581 (P. C.) : 41 C. L. J. 437 : 27 Bom. L. R. 707 : 48 M. L. J. 643 : 6 L. 226 : 23 A. L. J. 636 : 26 Cr. L. J. 1059 : A. I. R. 1925 P. C. 130 : 88 I. C. 3]

44. Hanmappa (1923) 25 Bom. L. R. 231 : 25 Cr.

L. J. 1349 : A. I. R. 1923 B. 262 : 82 I. C. 709.

45. In re Perumal (1898) 2 Weir 301. See also In re Sivaga (1903) 2 Weir 334. Cf. Pattikadan (1902) 26 M. 243 : 2 Weir 463.

46. Dyee Bhola (1864) 1 W. R. 40.

47. Haroon (1929) 30 Cr. L. J. 875 : A. I. R. 1929 S. 147 : 118 I. C. 193.

48. Gulab Singh (1935) 1935 A. L. J. 843 : 36 Cr. L. J. 1294 : A. I. R. 1935 A. 458 : 158 I. C. 38.

9. The Judge shall record such opinion.—

The opinion to be recorded is not confined to the statements made by the assessor in answer to the question put by the Judge to state his opinion, but also the answers subsequently made to questions specially put by the Judge to ascertain what his opinion really amounts to, including his reasons for such opinion (See Notes under the Heading "*And for that purpose,*" *post.*). This is evident from the words "and for that purpose," which follow.

The proper recording of the opinions of assessors has been pointed out very forcibly by Campbell, J. in *Q. v. Musst Mina*⁴⁹ in the following terms :—"It seems to me that it is too much the custom to neglect the opinions of the assessors, and put them in such a shape that this Court can make nothing of them. There is all the difference between the verdict of a Jury and the opinions of the assessors. The former is a simple and conclusive verdict of guilty or not guilty. The other is not a verdict, but an *opinion*, and, not having any legal validity, its weight seems to depend solely on the reason and sense by which it is supported. It appears, therefore, to me that, in recording in writing the opinion of each assessor as required by S. 324 (of the Code of 1861), the Sessions Judge should not merely put in his judgment that he concurs with or differs from the assessors, but should separately record an opinion of each assessor and should invite and encourage each assessor to make that opinion more than a bare expression for or against the prisoner, but an opinion on the case, stating the view that the assessor takes of the facts and the considerations (in brief) on which the opinion is founded."

Assessors ought to give the grounds of their opinion, particularly when they differ in opinion from the Judge.⁵⁰ In this case the High Court observed :—"Under the law a Jury is required to deliver its verdict. But assessors are appointed to aid the Judge in the trial, and are to give their opinion, and when that opinion differs from that formed by the Sessions Judge, the latter should always ascertain the grounds of the assessors' opinion. The decision does not rest with them, but they are to assist the Judge at the trial, and in no better mode can they assist him than by stating the reason for their opinion when the case is one on which there may be difference of opinion." In this case the High Court requested the Sessions Judge to recall the assessors and to ascertain from them and forward to the High Court the reason upon which they were of opinion that the accused ought to be found not guilty.

The opinion of each assessor is to be separately recorded.⁵¹ In order to comply with the provisions of S. 309, the Sessions Judge should put down at the time in writing the opinion actually given in his own words by each of the assessors. But the omission to do so is an irregularity.⁵² Where there were two assessors and the Judge recorded the opinion of only one of them, but stated in his judgment that the assessors unanimously convicted

49. (1865) 3 W. R. 6.

50. *Bushmo* (1865) 3 W. R. 21.

51. *Musst. Mina* (1865) 3 W. R. 6.

52. *Fatu Santal* (1921) 6 P. L. J. 147; 22 Cr. L. J. 417; 69 I. C. 705.

on all the counts, it was held that he committed an error, an omission, and an irregularity within the meaning of S. 537 Cr. P. C., but it did not occasion any failure of justice.⁵³

In a case where the opinion of the assessors has been taken, the trial is at an end and the Sessions Judge cannot thereafter re-open the trial and call another witness and invite the assessors' opinion on his evidence.⁵⁴

10. And for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and answers to them shall be recorded.—

The above words were added by the Amending Act XVIII of 1923. The amendments made in clause (1) of S. 309 bring it in conformity with S. 303 relating to Jury trial. The power of the Judge to put such questions was recognised in many judicial decisions prior to the aforesaid amendment. *See* Notes under the previous headings.

It was held, however, that the Judge had no power to question the assessors until they had delivered their opinions orally and he had recorded such opinions; if there was anything obscure in their verdicts there was no objection to the Judge asking questions to clear up such obscurity; but he was bound to allow the assessors to express their own opinions independently in their own words on the whole case, before interfering with them in any way or asking them any question whatever, except "what is your opinion".⁵⁵ Where the Sessions Judge, in taking the opinions of the assessors, put a large number of questions to them and then recorded their opinions on those questions: *Held*, that the Judge should have allowed the assessors in the first instance to have given their opinions in their own language and way, and when they had completed what they had to say, it would have been open to him to put to them such questions as were necessary to elucidate or supplement their opinions.⁵⁶ But the Patna High Court has observed that in a matter involving mixed questions of fact and law, it should be the duty of the Judge to put specific questions to the assessors to assist them in forming their own opinion before asking them the formal question, "what is your opinion".⁵⁷ Each of the assessors should be asked to give his opinion clearly as to what happened and he should then, if necessary, be asked to give his opinion on such matters as intention, knowledge, etc.⁵⁸ The words "And for that purpose" in the present amended Section, seem to lend support to the view expressed by the Patna and Lahore High Courts (*See* Notes under the Heading "The assessors' opinions must be taken on all the charges on which the accused has been tried", *ante*).

The cross-examination of the assessors is entirely contrary to law.⁵⁹

53. *Mulua* (1892) 14 A. 502 : 12 A. W. N. 95.

54. *Santa Singh* (1934) 35 P. L. R. 390 : 35 Cr. L. J. 1002 : 149 I. C. 442.

55. *Nazimuddi* (1912) 40 C. 163 : 13 Cr. L. J. 497 : 15 I. C. 641.

56. *Romesh Chandra* (1913) 41 C. 350 : 18 C. W. N. 498 : 15 Cr. L. J. 385 : 23 I. C. 985.

57. *Sunder Buksh* (1918) 1918 P. 359 : 19 Cr. L. J. 983 : 48 I. C. 163.

58. *Khewna* (1928) 30 Cr. L. J. 378 : A. I. R. 1929 L. 37 : 115 I. C. 66.

59. *Nazimuddi* (1912) 40 C. 163 : 13 Cr. L. J. 497 : 15 I. C. 641.

The assessors may be asked to give the *grounds of their opinions*, especially when the Judge differs from them.⁶⁰ They should be invited and encouraged to state briefly the grounds of their opinions as well as their conclusions.⁶¹ Where one of the two assessors says that he thinks it proved that a war was waged against the Queen, that there was conspiracy to carry on the war and the prisoner is guilty of all the acts charged, and the other assessor concurs with him, it cannot be said that they have given no reason for their opinion.⁶² Where one of the assessors merely found the accused not guilty of the offence charged and the other concurred with him; *held*, that such opinion could not be of any assistance to the Sessions Judge at the trial or to the High Court on appeal.⁶³

The opinion of assessors, as that of jurors, should be based upon a true understanding of the case, but the Judge must not probe deeper into the reasons that actuated an assessor in coming to his conclusions.⁶⁴

11. The Judge shall then give judgment.—S. 309(2).

The accused were committed to take their trial before a Sessions Court on a charge under S. 392 I. P. C. At the commencement of the trial, two more charges, under Ss. 214 and 411 I. P. C., were added. The trial then proceeded up to the point where the assessors gave their opinion. The Sessions Judge reserved his judgment; but in writing it he was of opinion that the trial had been illegal, in as much as the third charge under S. 214 had been improperly joined. He therefore cancelled the trial and held a fresh trial against the accused on charges under Ss. 392 and 411 I. P. C. *Held*, that the second trial was invalid, because the trial Judge had no authority to cancel or set aside the trial which had originally been held; and the assessors' opinion having been recorded, he had no option but to give his judgment in accordance with S. 309.⁶⁵ Where an accused was tried under S. 395 I. P. C., with the aid of a Jury and in the same trial he was tried under S. 396 I. P. C., with the same jurors as assessors, and the Judge after an elaborate charge to the Jury wrote a further order on the charge under S. 396 in which he stated that he agreed with the verdict of the Jury and found him guilty under S. 396: *Held*, that the charge to the Jury together with the subsequent order constituted a good judgment and that the conviction is not bad merely because he had not repeated his reasons for the conviction in the subsequent order; this omission being a mere irregularity curable by S. 537 Cr. P. C.⁶⁶ Where a Sessions Judge, agreeing with the assessors, simply makes an endorsement that the accused is acquitted and directs that he be set at liberty and writes the full text of his judgment assigning reasons for his order a few days later, he commits an irregularity under S. 537 Cr. P. C., but such irregularity does not vitiate the proceedings.⁶⁷

60. *Musst. Mina* (1865) 3 W. R. 6; *Bushmo* (1865) 3 W. R. 21 [See these cases noted under the heading "The Judge shall record such opinion," ante]; *Gurandiita* (1905) 6 P. L. R. 657; 48 P. R. Cr. 1905; 3 Cr. L. J. 132.

61. *Mahadu* (1900) 2 Bom. L.R. 322; *Fakira* (1900) 2 Bom. L. R. 323.

62. *Ameeroddeen* (1871) 15 W.R. 25; 7 B.L.R. 63.

63. *Fakira* (1900) 2 Bom. L. R. 323.

64. *In re Kunnammal* (1931) 1931 M. W. N. 1139.

65. *Nathu Rewa* (1915) 17 Bom. L. R. 1074; 16 Cr. L. J. 824; 31 I. C. 1000.

66. *Bisheshwar* (1929) 4 Luck 721; 31 Cr. L. J. 599; A. I. R. 1930 O. 57; 123 I. C. 851.

67. *Sankaralinga v. Narayana* (1922) 45 M. 913.

12. The Judge in giving judgment is not bound to conform to the opinion of the assessors.—Sub-S. (2) of S. 309.

It was held that the Judge, who was entitled to pass judgment, must be the Judge who tried the case and took the opinion of the assessors ; his successor in office could not pass judgment.⁶⁸

The opinion of the assessor has no legal validity.⁶⁹ It is not evidence under S. 3 of the Evidence Act.⁷⁰ The opinions are given in the exercise of a judicial function.⁷¹ The opinion is quasi-judicial, and the same as expert evidence.⁷²

Section 261 of the Code of 1872 declared that—"In cases tried with assessors, the Court shall proceed to pass judgment of acquittal or conviction, having considered the opinions of the assessors, but not being bound to conform to them". Thus the Judge in delivering his judgment should give it with advertence to the opinion of the assessors.⁷³ In fact, it was held that the prisoner had a right to require such consideration before the Judge formed his opinion.⁷⁴ The words about the consideration of the opinion of the assessors were omitted in the Code of 1882 ; but it has been held that the omission of the express words subsequently as surplusage did not alter the law : the Judge must consider, and cannot dispense with, the opinion.⁷⁵ The omission on the part of the Judge to make any reference in the judgment to the opinion of the assessors is certainly contrary to the usual practice ; it does not however vitiate the trial, but is merely an omission curable by S. 537, where the conclusions arrived at by the Judge were in accordance with the opinion of the majority of the assessors. In such a case it has been held that the failure to refer to the opinion in the judgment could not be said to have caused any failure of justice.⁷⁶ The advantage of taking such opinion was pointed out in a case in which the whole question was, whether a considerable number of native witnesses of the lower ranks of life had or had not told probable stories on behalf of the prosecution.⁷⁷ The Appellate Court is bound to give due weight to the opinions of the assessors, but they are not a substitute for untainted evidence.⁷⁸ A concurrent opinion of assessors must carry more weight than a single opinion.⁷⁹

But the Sessions Judge should not import into his judgment the opinion of an assessor derived from personal knowledge and unsupported by evidence on record.⁸⁰

23 Cr. L. J. 583 : A. I. R. 1922 M. 502 : 68 I. C. 615.

68. Gopi (1874) 21 W. R. 47 : Durga Charan (1908) 8 C. L. J. 59 : 8 Cr. L. J. 121. Cf. Savu Pasumbadi (1894) 2 Weir 392.

69. Musst. Mina (1865) 3 W. R. 6.

70. Tirumal (1901) 24 M. 523, 541 : 2 Weir 340 [applying Khandia (1890) 15 B. 66].

71. Tirumal (1901) 24 M. 523, 531 [Per Davies, J.] 2 Weir 340.

72. Tirumal (1901) 24 M. 523, 543 [per Bhashyam Ayyangar, J.] : 2 Weir 340.

73. Matam Mal (1874) 22 W. R. 34.

74. Bhootnath (1879) 4 C. L. R. 405, 410.

75. Tirumal (1901) 24 M. 523, 537 : 2 Weir 340.

76. Anup Singh (1933) 35 Cr. L. J. 163 : A. I. R. 1933 L. 910 : 146 I. C. 677 [distinguishing Gurandiita (1905) 6 P. L. R. 657 : 48 P. R. Cr. 1905 : 3 Cr. L. J. 132.]

77. See Munna Lal (1888) 10 A. 414 : 8 A. W. N. 129.

78. Narain Das (1922) 3 L. 144, 174 : 23 Cr. L. J. 513 : A. I. R. 1922 L. 1 : 68 I. C. 113.

79. Tirumal (1901) 24 M. 523, 531 : 2 Weir 340.

80. Ram Churn (1875) 24 W. R. 28.

The Section, however, says that the Judge is not bound to conform to the opinion of the assessors. He is the sole tribunal, though aided by each of the assessors, who are however not members of the Sessions Court; the responsibility of the decision rests with him only.⁸¹ The Code does not invest them with the power of appreciating the evidence so as to bind the Judge; regard must be paid to their opinion, but after all it is the Judge who is to decide the case on the facts as well as law.⁸² He is bound to form his own opinion on the case aided by assessors, but quite independently of any expression of opinion on the part of the Committing Magistrate.⁸³ Where the Judge has no reasonable doubt as to the guilt of the accused, he ought to act on his own view and convict the accused even if the assessors find the accused not guilty; the personal view of the Sessions Judge is the ultimate one.⁸⁴

In a trial by Jury, the Judge need not write a judgment, but he shall record the heads of the charge to the Jury. But in a trial with the aid of assessors, he must comply with the provisions of S. 367 Cr. P. C.,⁸⁵ though the omission to record the judgment or the grounds of his decision is only an irregularity within S. 537.⁸⁶ Where a Sessions Judge agreeing with the assessors simply makes an endorsement that the accused is acquitted and directs that he be set at liberty and writes the full text of his judgment assigning reasons for his order a few days later, he commits an irregularity under S. 537 Cr. P. C., but such irregularity does not vitiate the proceedings.⁸⁷ Where an accused was tried under S. 395 I. P. C., with the aid of a Jury and in the same trial he was tried under S. 396 I. P. C., with the same jurors as assessors, and the Sessions Judge after an elaborate charge to the Jury wrote a further order on the charge under S. 396 in which he stated that he agreed with the verdict of the Jury and found him guilty under S. 396: *Held*, that the charge to the Jury together with the subsequent order constituted a good judgment and that the conviction is not bad merely because he had not repeated his reasons for conviction in the subsequent order; and that this omission being a mere irregularity was curable by S. 537 Cr. P. C.⁸⁸ A Sessions Judge should record findings, whether of conviction or acquittal, on all the charges under which prisoners have been committed for trial.⁸⁹ The record should invariably show that any reference to previous conviction was not made until the subsequent offence was found proved against the accused.⁹⁰

81. Tirumal (1901) 24 M. 523, 537, 538 : 2 Weir 340.

82. Shankar (1912) 14 Bom. L.R. 710 : 13 Cr. L. J. 677 : 16 I. C. 325.

83. Dewan Singh (1895) 22 C. 805 ; Nawab Khan (1867) 7 W. R. 25.

84. Lakhan (1924) 26 Cr. L.J. 324 ; A. I. R. 1924 A. 511 : 84 I. C. 548.

85. Dattu (1888) Rat. 426 ; Savu Pasumbadi (1894) 2 Weir 392.

86. Savu Pasumbadi (1894) 2 Weir 392 ; Kala Karsan (1869) 6 B. H. C. R. 55.

87. Sankaralinga v. Narayana (1922) 45 M. 913 : 23 Cr. L. J. 583 : A. I. R. 1922 M. 502 : 68 I. C. 615.

88. Bisheshwar (1929) 4 Luck 721 : 31 Cr. L. J. 599 : A. I. R. 1930 O. 57 : 123 I. C. 851.

89. Mahomad Ali (1870) 13 W. R. 50.

90. Kristo Bahari (1883) 12 C. L. R. 555.

13. If the accused is convicted, the Judge shall pass sentence.—S. 309 (3).

As to conviction for an offence not charged—*See* Notes under the Heading "*Conviction for an offence not charged*", *ante*.

If the accused is acquitted, the Judge shall record judgment of acquittal. Cf. S. 306. Under S. 289 clauses (2) and (3) he may record a finding of not guilty, without taking the opinion of the assessors, and an order of acquittal necessarily follows. The accused is entitled to an order of conviction or acquittal; there cannot be an order of discharge.

Section 562 confers power on the Court to release certain convicted offenders on probation of good conduct instead of sentencing them to punishment.

Part III.—Misdirection.

CHAPTER I.

Of Offences.

In Chapter VII of Part II we have indicated generally the nature of directions which a Judge's summing up should contain. In this Part we propose to deal with such directions as are necessary or proper with regard to (a) Offences, (b) Procedure and (c) Evidence. In the present Chapter subject (a) will be considered.

S. 34. I. P. C.

Act done by several persons in furtherance of a common intention.—

The Jury should be told that to justify the application of S. 34 I. P. C., it is necessary to prove what may be briefly described as a common act and a common intention. The facts should then be referred to, and the Jury directed to consider whether the criminal act was done in furtherance of the common intention of all, and told that if so, each would then be liable.¹ Three persons armed with revolvers went to a Post office with a common intention to rob the Postmaster and if necessary to kill him; if the Postmaster's death resulted from a shot fired by one of them in furtherance of their common intention, each of them will be guilty of murder under S. 302 I. P. C., whichever of the three fired the fatal shot. A direction to the Jury that in such a case a verdict of guilty under S. 302 should be found against any of the three, who was caught, is a correct direction in law.² Where in a case of fracture of bones due to lathi blows the Judge explained to the Jury the circumstances which would bring the case under S. 325 I. P. C., and also explained the ingredients of the offence under S. 34 I. P. C., and then proceeded to observe as follows: "This Section (S. 34) there applies where more than one person co-operate with each other in bringing about an effect, intended by each of them. In the present case, Upendra and Haripada have been charged with thus co-operating to cause the death of Purna. If you think they co-operated not to commit an offence under S. 304, but to commit a lesser offence, e. g., one under S. 325 or under S. 323, you will say so. A sane adult may be presumed to intend the natural, probable, inevitable consequence of his deed." *Held*, that the Judge's directions were adequate and sufficient.³ The accused were being tried under Ss. 302/34 I. P. C. The Sessions Judge in charging the Jury said,—“S. 34 provides that where it is doubtful which of several persons has taken the chief part in any given crime committed in furtherance

Sri Prosad (1899) 4 C. W. N. 193.

Barendra (1923) 28 C. W. N. 170 (F. B.) : 38

C. L. J. 411 : 25 Cr. L. J. 817 : A. I. R. 1924

C. 257 : 81 I. C. 353. *See also* Hassenulla

Sheikh (1923) 28 C. W. N. 561, 566 : 26 Cr.

L. J. 5 : A. I. R. 1924 C. 625 : 83 I. C. 485 ;

Menga (1895) Rat. 748.

3. Upendra (1930) 52 C. L. J. 425 : 32 Cr. L. J. 416 : 129 I. C. 676.

of the common intention of all of them, each of such persons is severally liable as if he alone has done the deed. *Held*, that it is necessary for the Judge to read the very words of S. 34 itself to the Jury if he purports to give them what are the provisions of the Section, and then if necessary to explain what is the meaning of the Section and that the direction with regard to S. 34 was not a proper direction.⁴ Where the Judge after reading and explaining S. 34 (where the accused were being tried under Ss. 304/34 and S. 147) said in his charge to the Jury : "This Section is framed to meet a case in which it is difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them. *Held*, that this is not very satisfactory. Later on he asked the Jury "to consider whether the acts were done in furtherance of the common intention to prevent B from cutting the paddy". *Held*, that these are words which would have done fairly well for a charge under S. 149 I. P. C., but they are inapplicable as applied to S. 34, for the latter Section refers to cases in which several persons both do an act and intend to do that act ; it does not refer to cases where persons intend to do one act, such as preventing the cutting of paddy, and some one or more of them do an entirely different act ; and that these faults in the charge were prejudicial to the accused ; and so a fresh trial was ordered.⁵ In cases of joint beating a finding of individual guilt under Ss. 34-38 I. P. C., should be directed.⁶ A Jury may be directed that S. 34 applies to the second part of S. 304 I. P. C.⁷

The Judge ought to give clear directions on the law of abetment and call on the Jury to decide upon S. 34 I. P. C., whether the prisoners, if present, had a common intention and what that intention was ; for, a murder committed in an unlawful enterprise may be the design and act of one person only to gratify his private revenge, as in *Plummer's Case*,⁸ from which definition of the law of England S. 149 is taken ; the summing up of the evidence ought, therefore, to have been special as to each prisoner ; the question whether each prisoner had a design to kill required much careful consideration, and was one for the Jury as judges of the facts and was not to be withdrawn from them by the Judge giving positive direction that it was impossible not to hold that on proof of the arson the guilt of homicide was to be inferred. Where insufficient and incorrect directions on matters of law cause serious prejudice to the accused, the convictions and sentences should be set aside.⁹

S. 83. I. P. C.

Act of a child.—

In *R. v. Owen*,¹⁰ Littleale, J. in charging the Jury said,—“Whenever a person committing a felony is under fourteen years of age the presumption of law is that he or

4. Durga Charan (1922) 26 C. W. N. 1002 : 36 C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922 C. 124 : 58 I. C. 407.

5. Aniruddha (1924) 26 Cr. L. J. 827 ; A. I. R. 1925 C. 913 : 86 I. C. 475.

6. Babya (1899) 1 Bom. L. R. 784.

7. Adam Ali (1926) 31 C. W. N. 314 : 45 C. L. J. 131 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718.

8. (1700) Kel J. 109.

9. Menga (1895) Rat. 748.

10. (1830) 4 C. & P. 236.

she has not sufficient capacity to know that it is wrong, and such person ought not to be convicted unless there be evidence to satisfy the Jury that the party at the time of the offence had a guilty knowledge that he or she was doing wrong." Under the Indian law,

"Nothing is an offence which is done by a child under seven years of age" (S. 82 I.P.C.) ;

"Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion" (S. 83 I. P. C.).

Under the English law when a child between the ages of 7 and 14 years is indicted for felony, two questions are to be left to the Jury ; 1st. whether he has committed the offence; and 2nd. whether at the time he had guilty knowledge that he was doing wrong.¹¹

An accused person cannot be debarred from the defence allowed him by S. 83 I. P. C., because of his ignorance of Court procedure. A Sessions Judge said : "The law no doubt is that a person between 7 and 12 years of age is not to be held responsible for the consequences of his act, if it should be proved that he is not possessed of sufficiently mature understanding and was incapable of understanding the nature of the act done by him. When an accused wants to take shelter under such a plea he should allege it in clear words and be also prepared to produce some evidence on the point. In the present case, the accused has neither alleged nor adduced any evidence to prove that he is less than 12 years of age and is a man of immature understanding. On the other hand, from the manner of his own statement before the Court and his general development coupled with the admission of his present age, the jurors should also see whether it would or would not have been quite proper to overrule the plea even if the plea should have been actually raised in the case. I would therefore direct the jurors to give no consideration to the argument of N's learned pleader about his tender age or immature understanding and leave the argument out of account altogether". *Held*, that it was a question which was entirely for the Jury.¹² The question is one of fact on which, in cases tried by a Jury, the accused is entitled to the Jury's verdict.¹³ Where the Jury is excluded from the consideration of the question, it is a misdirection.¹⁴

S. 84 I. P. C.

Act of a person of unsound mind.—

It is not because a man commits a very horrible murder, or because he commits it while labouring under strong passions and feelings, that therefore the world is to assume that he must have been insane when he committed the deed. The fact of unsoundness

11. R. V. Owan (1830) 4 C. & P. 236; Smith (1845) 1 Cox. 260. *But see* Gorrie 83 L. J. 136.

12. Ali Raza (1924) 26 Cr. L. J. 310 : A. I. R. 1925 O. 311 : 84 I. C. 454.

13. Imam (1869) Rat. 27.

14. Ali Raza (1924) 26 Cr. L. J. 310 : A. I. R. 1925 O. 311 : 84 I. C. 454.

of mind is one which must be clearly and distinctly proved, before any Jury is justified in returning a verdict under S. 84 I. P. C. Every man is presumed to be sane and to possess sufficient degree of reason to be responsible for his crime, until the contrary is proved. Proper directions accordingly should be given to the Jury.¹⁵ It is a mistake to suppose that in order to satisfy a Jury that the plea of insanity is well-founded, scientific evidence must be adduced. If the existence of facts is such as to indicate an unsound state of mind, that is quite sufficient; though the onus of proof of the plea is on the accused and it must be proved by him affirmatively.¹⁶ The opinion of an expert on lunacy cannot be brushed aside upon the strength of the lay opinion of a trial Judge.¹⁷ A Sessions Judge, in his charge to the Jury, told them that, in his judgment, the accused was, at the time of his trial, exhibiting symptoms of unsoundness of mind, and he directed them to find whether the accused was insane at the time he committed the offence; *held*, that this was misdirection; the issue as to whether the accused was of unsound mind at the time of the trial and incapable of properly making his defence, was a preliminary issue to that put by the Sessions Judge, and should, under S. 425 (now S. 465) Cr. P. C., have been first submitted to the Jury.¹⁸ In considering the plea of insanity the Court is concerned solely with the state of mind of the accused at the time of the act; his antecedent and subsequent conduct is relevant only to show what his state of mind was at the time when the act was committed.¹⁹

Ss. 85 and 86 I. P. C.

Intoxication.—

Under S. 84, unsoundness of mind producing incapacity to know the nature of the act committed or that it is wrong or contrary to law is a defence to a criminal charge, but by S. 85 such incapacity is no defence, if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity, then S. 84 applies though the disease may be of a temporary nature.²⁰

The Judge in his summing up told the Jury that drunkenness in the eye of law makes an offence the more heinous. There is no authority for such a proposition, and all that the Judge should have said was that drunkenness is no excuse, and that an act, which if committed by a sober man is an offence, is equally an offence if committed by one when drunk, if the intoxication was voluntarily caused.²¹

Mayne says²² :—"Section 86 lays down no rule as to the inference of intent

15. Nobin Chunder (1873) 20 W. R. 70 : 13 B. L. R. App. 20 ; Babu (1881) Rat. 172.

16. ~~Bazler~~ Rahaman (1928) 33 C. W. N. 136 : 48 C. L. J. 307 : 30 Cr. L. J. 494 : A. I. R. 1929 C. 1 : 125 I. C. 561.

17. Onkar Datt (1934) 1935 O. W. N. 53 : 36 Cr. L. J. 392 : A. I. R. 1935 O. 143 : 154 I. C. 780.

18. Doorjodhun (1873) 19 W. R. 26.

19. Moon (1927) 29 Cr. L. J. 393 : A. I. R. 1928 P. 363 : 108 I. C. 424.

20. Bheleka Atham (1902) 29 C. 493 : 6 C. W. N. 506.

21. Zoofkar (1871) 16 W. R. 36.

22. Mayne's Criminal Law of India § 201 (referring to Meakin, 7 C. & P. 267 ; Thomas, 7 C. & P. 817 ; Pearson's Case, 2 Lewin 144)

in case of intoxication, but there seems no reason to suppose that the framers of the Indian Penal Code proposed to introduce a different rule from that of the English law. Intention is sometimes a presumption of law : e. g., a man is assumed to intend the natural or necessary consequences of his own act, and in the majority of cases the question of intention is merely the question of knowledge. If I strike a man on the head with a loaded club, I am assumed to know that the act will probably cause death and if that result follows I am assumed to have intended that it should follow. As the drunkard is assumed to have had the knowledge, he must necessarily be assumed to have had the intention since, assuming the knowledge, the law will allow no other explanation of the act to be given. But sometimes intention has to be proved like any other fact. For instance, supposing a fatal blow to be struck under circumstances of grievous provocation ; it might be shown that notwithstanding the provocation the defendant had acted, not under its influence, but from a preconceived resolution to kill. If so, the offence would be murder. But the mere fact of the deadly blow would not be sufficient evidence for that purpose. Given the provocation, the legal inference derivable from the character of the blow would be exhausted in making the act culpable homicide not amounting to murder. Evidence of a different state of mind would be required to constitute the graver charge. In this state of things intoxication would be admissible in evidence, for the purpose of showing that the prisoner had acted under the excitement of drunken passion, rather than under fixed settled malice. So, if a man is found in the house of another by night it would be very material in considering whether he came with the intention of committing a robbery."

In *R. v. Cruse*,²³ Thomas Cruse and his wife were indicted for the offence of inflicting an injury dangerous to life with intent to murder under 1 Vict. C. 85, S. 2. Both the prisoners were very drunk. Patteson, J. in summing up said : "Before you can find the prisoner Thomas Cruse guilty of this felony you must be satisfied that when he inflicted this violence on the child he had in his mind a positive intention of murdering that child. Even if he did it under circumstances which would have amounted to murder if death had ensued, that will not be sufficient unless he actually intended to commit murder. With respect to his wife, it is essential not only that she should have assisted her husband in the commission of the offence but also that she should have known that it was her husband's intention to commit murder. It appears that both these persons were drunk : and although drunkenness is no excuse for any crime whatever, yet it is often of very great importance when it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of very great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering the child you may still find them guilty of an assault."

In *R. v. Monkhouse*,²⁴ Coleridge, J. said : "Drunkenness is ordinarily neither a defence nor excuse for a crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it and it is not enough that he was excited or rendered more irritable,

23. (1838) 8 C. & P. 541.

24. (1849) 4 Cox. C. C. 55.

unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist. To ascertain whether or not it did exist in this instance, you must take into consideration the quantity of spirit he had taken as well as his previous conduct."

In *R. v. Doherty*,²⁵ which was a trial for murder, Stephen, J. said: "Although you cannot take drunkenness as an excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that the man was in drink in considering whether he formed the intention necessary to constitute the crime."

Delirium tremens caused by excessive drinking is different from drunkenness; if it produces such a degree of madness as to render the person incapable of distinguishing right from wrong at the time the offence is committed, there is no criminal responsibility.²⁶ The House of Lords in *Beard*²⁷ restored a conviction for murder for which a conviction for manslaughter had been substituted (See 14 Cr. A. R. 110) by the Court of Criminal Appeal. The head-note in the case says—"Insanity whether produced by intoxication or not is a defence to a criminal charge. When a specific intent is a necessary ingredient of the offence charged, the Jury may take into consideration evidence going to show that the defendant was so intoxicated as to be unable to form such intent. Evidence of intoxication falling short of such incapacity, though it may establish a more ready tendency to some violent passion than if the defendant was sober, does not rebut the presumption of the existence of an intent to produce the natural consequences of his acts. There is an essential difference between a defence founded on insanity and one founded on intoxication, and in a direction to a Jury care must be taken to distinguish between the tests in each case respectively, that in the latter there should be a distinct warning that there is no plea of insanity, and except on that plea the question whether the defendant knew that he was doing wrong is irrelevant."

S. 94 I. P. C.

Compulsion.—

Under S. 94 I. P. C., a plea of compulsion by threats which reasonably cause the apprehension of instant death is a good defence by a person charged with any offence except murder and offences against the State punishable with death. The word 'murder' in the Section does not include abetment of murder punishable under S. 109 I. P. C. The accused charged with abetment of murder made a confession in which the plea of compulsion was stated. In such a case the omission by the Judge to direct the Jury that if they believed the confession, they could not convict of the offence charged, was a misdirection vitiating the conviction.²⁸

25. (1887) 16 Cox. C. C. 306.

26. *Davis* (1831) 14 Cox. C. C. 563.

27. (1920) 14 Cr. A. R. 159.

28. *U. nadasi* (1924) 52 C. 112; 28 C. W. N. 1046; 40 C. L. J. 143; 26 Cr. L. J. 11; A. I. R. 1924 C. 131; 83 I. C. 491.

Ss. 96-104 I. P. C.

Right of Private Defence.—

The Judge is entitled to tell the Jury that when a prisoner is charged with wounding another, the burden of proving that the wound was inflicted in the exercise of the right of private defence lies on the prisoner. The Judge may go further and say that a plea in this form, "I was not present and did not strike the complainant, but if I did strike him I acted in self-defence", is not very convincing; nevertheless, it is open to the prisoner to adopt such a defence in the alternative, and, if he can not satisfy the Jury that he did not strike the complainant but can satisfy them either by the cross-examination of the complainant's witnesses or by adducing evidence on his own behalf, that in striking the complainant he acted in self-defence, then he is entitled to an acquittal.²⁹ A direction that the plea of private defence cannot be raised because the acts were not admitted has been held to be wrong.³⁰ Judge telling the Jury that the accused has not chosen to set up a plea of private defence, when it was inferable from the trend of cross-examination of the prosecution witnesses, amounts to misdirection.³¹ But if there is absolutely nothing in the prosecution evidence to suggest that he was so acting, there is nothing to go to the Jury. It is very difficult for the Judge to put to the Jury what is really a hypothetical and nobody's substantial case. There are so many factors and circumstances which require to be proved to establish a right of private defence that it is difficult to see how it can be successful unless specifically pleaded. The Judge has always this difficulty that he never knows what in each case he has to put and it is very difficult for an Appellate Court to discover what case he was asked to put to the Jury on behalf of the accused when they themselves say nothing, or for an Appellate Court to say that the accused's case of right of private defence was or was not properly put, for the simple reason that the Appellate Court does not know what that case was.³² If on the materials placed by the prosecution and the defence there is no question of private defence, it is not necessary for the Judge to explain the law on that subject.³³

Failure to explain the law of private defence, and omission to place the law on the point as bearing on the facts and of proper directions as to how far the accused had the right, is a misdirection vitiating the trial.³⁴ Where the real question in the case was whether there was the right of private defence or not and the Sessions Judge asked whether the right of private defence was or was not exceeded, it is a serious misdirection. Where in explaining S. 100 I. P. C., the Sessions Judge told the Jury, "If there be reasonable apprehension of killing or robbing, the attack may be met by killing", but made no mention of an apprehension of

29. Afruddi (1919) 23 C. W. N. 833 : 29 C. L. J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485.

30. Afruddi (1919) 23 C. W. N. 833 : 29 C. L. J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485. See also Faudi (1919) 5 P. L. J. 64 : 21 Cr. L. J. 799 : 58 I. C. 527.

31. Kuti (1930) 51 C. L. J. 339 : 31 Cr. L. J. 1203 : A. I. R. 1930 C. 442 : 127 I. C. 263.

32. Adam Ali (1926) 31 C. W. N. 314, 317 : 45 C. L. J. 313 : 28 Cr. L. J. 334 : A. I. R. 1927 C. 324 : 100 I. C. 718.

33. Fajor Ali (1933) 57 C. L. J. 583 : 35 Cr. L. J. 536 : A. I. R. 1934 C. 142 : 117 I. C. 1043.

34. Aseruddin (1926) 53 C. 980 : 28 Cr. L. J. 273 : A. I. R. 1927 C. 257 : 100 I. C. 353,

grievous hurt, it is also a misdirection. It was also necessary that S. 101 I. P. C., should have been explained to the Jury and the Jury should have understood that Section also before giving a verdict on the minor charge of causing grievous hurt.³⁵ In this case it was pointed out that where a person is set on by an angry crowd and there is apprehension of death or grievous hurt being caused, the only remedy is the drastic one of shooting to kill in the first instance, as anything less is likely to increase the fury of the crowd, and that an angry crowd is the more dangerous as the persons composing it would commit crimes jointly which they would never commit individually.

In a case under S. 304 I. P. C., the defence was that the accused woke up at night and found the deceased coming from inside the accused's hut and inflicted wounds on him which resulted in his death. *Held*, that if the deceased came to the house with the intention of committing robbery and if he came from inside the hut, the Judge should have charged the Jury that if they accepted the story for the defence they would have to consider whether there was a reasonable belief or apprehension in the mind of the accused that the thief had with him or was likely to have with him the articles which he had taken from inside the hut, and he should have further charged the Jury that if they accepted the story on behalf of the accused with regard to the probability that the thief had with him articles taken from inside the hut they should consider whether the accused in the exercise of his right of private defence of property under S. 103 I. P. C., used more force than was reasonably necessary for preventing the thief from getting away with the property.³⁶ When trespassers began cutting and carrying away crops grown by the person in possession, reasonable apprehension to the property having already commenced, the right of private defence of the latter commenced at the same time; and it was a misdirection on the part of the Judge to leave it to the Jury to say whether the fact that the Police Station was only nine miles off from the place of occurrence did not take away that right. The reference in such circumstances to his civil remedies also amounted to misdirection.³⁷ In a case in which the accused were resisting the theft of their crops and some of them used excessive violence in the exercise of the right of private defence, the Sessions Judge in his charge to the Jury ought to tell them that if the accused were justified in resisting the theft of their crops they could not be all considered members of an unlawful assembly simply because some of them exceeded the right of private defence; but he should draw the attention of the Jury to the fact that the question for their consideration in such a case with regard to the guilt of the accused, who did not exceed the right of private defence, was whether they continued in the assembly of those who exceeded that right, aiding and abetting them.³⁸

In a case of culpable homicide the Judge called the attention of the Jury to Ss. 96 and 97, Cl. (1), to S. 99, Cl. (4) and to S. 100 Cl. (6). He at the same time also asked

35. Mahommed Yunus (1922) 50 C. 318 : 25 Cr. L. J. 467 : A. I. R. 1923 C. 517 : 77 I. C. 819.

36. Mookhtaram (1872) 17 W. R. 45.

37. Meher Sardar (1911) 16 C. W. N. 46 : 13 Cr. L. J. 26 : 13 I. C. 218.

38. Baij Nath (1908) 36 C. 296 : 13 C. W. N. 677 : 9 Cr. L. J. 443 : 1 I. C. 973.

the Jury whether they believed that M's party (the party of the accused) were only three in number and that they were attacked by some twenty-five men on the other side, or whether it was more probable on the evidence that M's party were in larger force than they represented themselves to be and were prepared and armed to meet and to resist A's (complainant's) party. The objection which the pleader for the prisoner took to the Judge's charge to the Jury was that he did not call their attention to Clauses (1) and (2) of Section 100 of the Penal Code and that he ought to have asked the Jury whether they considered that the prisoner M had not reasonable cause to apprehend death in consequence of the assault made upon him by A's party. *Held* :—"The right of private defence is extended by Section 100 of the Indian Penal Code under certain restrictions ; these restrictions are laid down in Section 99 of the Code. There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. This is laid down in Clause (3), Section 99. Now, there is evidence in this case, which the Judge refers to in his charge to the Jury, to the effect that M was not prevented or was not unable to have recourse to the public authorities for protection, and therefore it was on this account that the Judge more particularly called the attention of the Jury to Clause (6) of Section 100 and told them to find on the evidence whether they were of opinion that the assault on M, if any, on the part of A's party was under such circumstances as to reasonably cause M to apprehend that he would not be able to have recourse to the public authorities for his protection, and the Jury evidently, from their unanimous verdict, believed that this was not a case in which A's party were wholly the aggressors, but that M's party were armed and prepared to fight and that the prisoner M with that intention armed himself with a dangerous weapon with which he killed the deceased." It was, therefore, *held* that it was not a misdirection on the part of the Judge not to call their attention to Clauses (1) and (2) of S. 100 I. P. C., when he had particularly called their attention to Cl. (6) of that Section. ³⁹

Ss. 107-117 I. P. C.

Abetment.—

The prisoner was charged with the abetment of forging a deed of sale purporting to be executed by one B in favour of A and W under Ss. 114 and 467 I. P. C. A and W were acquitted, and B, who was called as a witness, denied having executed the deed. The prisoner was convicted and the High Court set aside the conviction on the ground of misdirection and directed a fresh trial by a fresh Jury. In directing how the fresh trial should be conducted, the High Court said : "In presenting the Jury with a clear statement of the facts which the evidence may disclose, and in telling them that they are to exercise their own judgment in deciding on the credibility of the same, the Judge will be careful to put before them one point, viz, whether, supposing

the Jury to believe the evidence of the execution of the deed, and of the personation of B, the prisoner may or may not have simply appeared in this professional capacity, or whether he has or has not acted without any corrupt motive, and simply for the benefit and at the direction of others. To sustain such a conviction a corrupt motive must be shewn, or must be fairly inferable from the evidence".⁴⁰ A charge to the Jury that the charge of abetment of giving false evidence can be sustained even when the false evidence given was not before a Court of Justice but before a Police Officer, is a proper charge; because to make out an abetment it is not necessary that the offence itself should have been committed.⁴¹ In order to convict a person of abetting the commission of a crime, it is not only necessary to prove that he has taken part in those steps of the transaction which are innocent, but, in some way or other, it is absolutely necessary to connect him with those steps of the transaction which are criminal. Therefore, in a trial for an offence of abetting the giving of false evidence the Jury must be told that they must be satisfied that the accused not only intended that the alleged false statements should be made but that he intended that those statements should be made falsely. Where, therefore, the charge of the Judge to the Jury was such that it might have misled the Jury to come to the conclusion that it was an offence to instigate a person to make statements which ultimately turned out to be false, whether the persons who instigated them knew them to be false or not; *held*, that the conviction under S. 115 read with S. 194 I. P. C., must be set aside.⁴² Where there was evidence that certain persons conspired to eject the complainant from his land, or, in other words, to commit criminal trespass, and the Judge said that if the Jury found that those persons conspired with the first accused to commit criminal trespass, then they would, if absent, be guilty of abetment, and being present they were guilty of the substantive offence: *held*, that the omission to notice that the substantive offence for which the accused were being tried was not one of criminal trespass but of voluntarily causing grievous hurt, constituted misdirection; *held also*, that when the evidence against the co-accused was that they themselves came with the first accused and joined in beating the deceased, they could not be convicted of abetting the causing of grievous hurt by their presence, because they would have been guilty of abetment had they been present. If it be found that they all joined in the beating and that the specific act which caused the grievous hurt was not brought home to any particular individual, they would be held liable under S. 34 I. P. C.; if they aided and abetted or abetted by intentionally aiding the first accused in beating the deceased, then they would be liable under S. 326 read with S. 109 I. P. C.⁴³ Where an accused was charged with an abetment of an offence and the Sessions Judge did not adequately explain the law as to abetment to the Jury and the difference between abetment and being an accessory after the fact, it amounts to a material defect in the charge.⁴⁴ An omission to give information that a crime has been

40. *Jehan Buksh* (1866) 5 W. R. 68.

41. *Nim Chand* (1873) 20 W. R. 41.

42. *Ibid.*

43. *Jamiruddi* (1912) 16 C. W. N. 909 : 13 Cr. L. J. 715 : 16 I. C. 523.

44. *Hemanta* (1919) 47 C. 46 : 30 C. L. J. 29 : 21 Cr. L. J. 775 : 58 I. C. 455.

committed does not, under S. 107 I. P. C., amount to an abetment, unless such omission involves a breach of a legal obligation ; and a private individual is not bound by any law to give information of any offence which he has seen committed.⁴⁵ In this case the prisoner confessed to having seen two persons, whom he named, hold a boy under water and drown him. The Judge directed the Jury to find the prisoner guilty of abetment, if they believed the prisoner's statement. The Jury accordingly found the prisoner guilty of abetment. After the verdict was given the Judge considered this part of his direction to be incorrect, as the concealment, being subsequent to the commission of the offence, could not be regarded as an abetment of the offence. Being of that opinion he convicted the prisoner under S. 202 I. P. C. *Held*, that the direction given by the Judge was wrong as this omission would not amount to abetment under S. 107 I. P. C., unless it involves a breach of a legal obligation, and that to convict the prisoner of an offence under 202 I. P. C., for which he was not tried was also wrong.⁴⁶

Referring to S. 107 Explanation 2, it was said : "The supplying of necessary food to a person known to be engaged in a crime is not *per se* criminal ; but if food were supplied in order that a criminal might go on a journey to the intended scene of the crime, or conceal himself while waiting for an opportunity to commit the crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it."⁴⁷ Where the charges against R and C were that they abetted by being present an offence of personation by T, and the charge against T was not substantiated and T was acquitted : *Held*, that the omission on the part of the Judge to tell the Jury that the charges against R and C should fail if that against T failed was a misdirection.⁴⁸ But there may be an exception to the general rule that a charge of abetment fails if the substantive offence is not established against the principal,—where the substantive offence was undoubtedly committed, and there is evidence, such as a retracted confession by the abettor, on which the Jury might have found as against him that the offence was committed by the principal, though as against the latter, the confession would be insufficient for a conviction.⁴⁹ Where the accused identified one X as P before the Mahomedan Registrar of Marriages, who obtained the registration of P's divorce from his wife, his guilt as regards an offence under Ss. 466/114 I. P. C. would depend chiefly on whether he knew that X was not P or had no knowledge whether he was P or not ; and where this point was fairly put before the Jury, there was no misdirection.⁵⁰ Where it was contended that the charge of the Judge did not adequately bring home to the Jury that abetment of murder could not be properly inferred from a conspiracy to kidnap unless the natural result of the attempt to kidnap was murder, and the words used by the Judge after explaining S. 111 I. P. C., were as follows :—"I merely emphasize once more that the

45. Khadim Sheikh (1869) 4 B. L. R. A. Cr. 7.

46. *Ibid*.

47. *In re Lingam Ramanna* (1880) 2 M. 137 : 1 Weir 46.

48. *Raja Khan* (1920) 32 C. L. J. 478 : 22 Cr. L. J. 448 : 61 I. C. 800.

49. *Umadasai* (1924) 52 C. 112 : 28 C. W. N. 1046 : 40 C. L. J. 143 : 26 Cr. L. J. 11 : A. I. R. 1924 C. 1031 : 83 I. C. 491.

50. *Yasin Sheikh* (1904) 9 C. W. N. 69 : 2 Cr. L. J. 8.

crucial point as regards the applicability of that Section is whether that which is done was a probable consequence of the abetment ; was it a probable consequence of the conspiracy into which accused had entered that B would be murdered on the night of January 12th ? Unless you can so find that, charge of murder cannot be established". *Held*, by the Privy Council that this advice was adequate to the situation.⁵¹ The accused had given a large quantity of aconite to a young married girl, and the girl under the impression that her husband would begin to love her and consent to send her to her father's house if he could be made to take the same substance with his food, had mixed the same with the mid-day meal of the whole family. On eating the food, the husband's father and an elder brother died. At the trial the prosecution failed to examine the girl as to the conversation she had with the accused at the time the poison had been handed over to her—whether or not the accused had cautioned her to keep the substance only for the husband—and the Sessions Judge failed to lay before the Jury the consideration of this fact with reference to the proviso to S. 111 I. P. C. : *Held*, that this was a question for the Jury and it would be inadvisable for the Appeal Court to substitute a finding of its own upon this question of fact ; and as, by reason of the said misdirection, the prosecution could not uphold the verdict as it stood, the best and safest course was to substitute a conviction under Ss. 302/115 for that under Ss. 302/109 I. P. C.⁵²

One of the best explanations as regards the different kinds of abetment was given by the Madras High Court in its *Proceedings* dated 8th March 1859. It was said :—"S. 114 of the Penal Code simply provides for the punishment of what the English Law calls principals in the second degree. A person present, abetting an offence, is to be *deemed* to have committed the offence, though he does not in fact do so any more than a principal of the second degree. Hence, "all who are present, aiding and assisting a man to commit a rape, are principal offenders in the second degree, whether they be men or women" (1 Russ. 905) ; and hence Lord Audley (3 Howell's State Trials, 401) was convicted as a principal of a rape on his own wife because he aided another to ravish her. There are several modes of abetment defined in the Penal Code. One is instigating another to commit an offence. If A investigates B to murder Z he commits abetment ; if absent, he is punishable as an abettor ; and if the offence is committed, then under S. 109 ; if present, he is by S. 114 to be *deemed* to have committed the offence, and is punishable as a principal. Another mode of abetment is by intentionally aiding, by any act or illegal omission, the doing of an offence. A aids B to murder Z ; if absent, he is punishable as an abettor, and may be liable under S. 109 ; if present, then he is to be *deemed* as much to have committed the offence as if he had struck the fatal blow. The meaning of S. 114 is that, if the nature of the act done constitutes abetment, then, if present, the abettor is to be deemed to have committed the offence, though in point of fact another actually committed it."⁵³

51. Shafi Ahmed (1925) 30 C. W. N. 557 (P. C.) :

43 C. L. J. 67 : 28 Bom. L. R. 158 : 49

M. L. J. 834 : 27 Cr. L. J. 228 : A. I. R.

1925 P. C. 305 : 92 I. C. 212.

52. Amode Ali (1931) 58 C. 1228 : 35 C. W. N.

573 : 33 Cr. L. J. 79 : A. I. R. 1931 C. 757 :
134 I. C. 896.

53. H. C. Proceedings, 8th March 1869, No 459.
1 Weir 49 : 4 M. H. C. R. App. xxxvii.

Where the only evidence against an accused on a charge of abetment of lodging a false complaint was that he had given evidence in support of that complaint, and the Judge in his charge to the Jury relied upon that fact in proof of his guilt, it was *held* that it was a misdirection in as much as the offence of abetment must be committed either before or at the time when the act abetted was committed and there cannot be an abetment of an act after it has been committed.⁵⁴

S. 120B 1. P. C.

Conspiracy.—

In *R. v. Manning*,⁵⁵ Manning and Hannan were tried for conspiring together to cheat and defraud. Lord Coleridge, C. J. directed the Jury that they might find one prisoner guilty and acquit the other. This was held to be misdirection and the principle was laid down that where two persons are indicted for conspiring together and they are tried together, both must be acquitted or both convicted. Mathew, J. said: "The rule appears to be this in a charge for conspiracy in a case like this, where there are two defendants, the issue raised is whether or not both the men are guilty, and if the Jury are not satisfied as to the guilt of either, then both must be acquitted. In *Rex. v. Cooke* (5 B. & C. 538) the Court could not have pronounced the judgment they did unless they assumed the existence of the rule. So in *Reg. v. Thompson* (16 Q. B. 832) it appears that the Court were of opinion that this rule existed. The authority does not rest there. There is, in addition, a passage in the judgment in *Robinson v. Robinson and Lane* (1 Sw. & Tr. 362) in which the rule of law is treated as perfectly clear. Lastly, there is the judgment of the House of Lords in *O'Connell v. The Queen* (11 Cl. & F. 155) which seems to me to be another clear illustration of this rule. It appears to me, therefore, that the direction given here was one which should not have been given to the Jury, and that there must be a new trial". Stephen, J. concurred, though with great reluctance and entirely upon the authority of *O'Connell v. The Queen* (11 Cl. & F. 155). In *R. v. Plummer*⁵⁶ the Court of Crown Cases Reserved held that on the trial of an indictment charging three persons jointly with conspiring together, if one pleads guilty and has judgment passed against him, and the other two are acquitted, the judgment passed against the one who pleaded guilty is bad and cannot stand. But when two prisoners are jointly indicted for conspiracy and also (in other counts) for other offences, it is wrong to lead the Jury to believe that unless both are convicted neither may be convicted on one of the other counts.⁵⁷ Where a charge is against several defendants for conspiring to do several illegal acts, a finding of the Jury that one of them is guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with other defendants to do another of the acts is bad as amounting to a finding that the defendant is guilty of two conspiracies, whereas the charge is only one.⁵⁸

54. *In re Jugut Mohini* (1881) 10 C. L. R. 4.

55. (1883) 12 Q. B. D. 241; 32 W. R. (Eng) 720.

56. (1902) 2 K. B. 339; 20 Cox. C. C. 269. See

also *Beach* (1909) 2 Cr. A. R. 189; *Hillman* (1931) 23 Cr. A. R. 53.

57. *Taylor* (1924) 18 Cr. A. R. 153.

58. *O'Connell* (1844) 11 Cl. & F. 155 (H. L.)

In a charge to the Jury in a conspiracy case it is very necessary not only that there should be a consideration of the conspiracy and a determination as to what was its nature and by what evidence it is proved ; but unless it is quite clear that if there was a conspiracy all the accused were members of it, there should be somewhere a separate statement and criticism of the proved actions of each of the members of the conspiracy. If this is not done, the Jury may take it for granted that all the members were knowingly members of the conspiracy and that the only question was whether the conspiracy was criminal.⁵⁹

A conspiracy may be proved by evidence other than oral evidence. It may be proved by the evidence of surrounding circumstances and the conduct of the accused, both before and after the alleged commission of the crime. Where, therefore, a Judge in his summing up, referring only to the oral evidence relating to a meeting at a certain place, said that there was no evidence against some of the accused, and referring to the oral evidence relating to actual participation in the crime made similar remarks ; *held*, it was a misdirection.⁶⁰

In a charge of conspiracy to commit murder and of murder, it is not necessary that there should be express proof of conspiracy. It is not necessary to prove that two or more persons came together and actually agreed in terms to have the common design and to pursue it by common means and so carry it into execution. There may be no witnesses to say that in their presence the conspirators agreed to carry out an unlawful object. From the acts and conduct agreement can be inferred. If it is proved that they pursued by their acts the same object often by the same means, one performing one part of the act and the other another part of the same act so as to complete it with a view to the attainment of the object which they were pursuing, the inference that they conspired together to effect that object can be drawn. The question whether certain acts were done in pursuance of a conspiracy or were done separately without any pre-arranged plan depends upon the evidence in each case. The evidence must show a common plan so as to exclude a reasonable possibility of the acts of the conspirators having been done separately and connected only by coincidence.⁶¹

On a charge against an accused Sub-Inspector that he conspired with the other accused to fabricate false evidence with intent to cause a person to be convicted of a capital offence, the Judge directed the Jury that though the accused believed that the story of murder was true yet he might have conspired with the other accused that they should give the detailed evidence which they did give and that he should make false entries in his diaries. *Held*, that this was a direction likely to mislead the Jury ; that no doubt it is possible that the offence of fabricating evidence to obtain a capital conviction can be committed though the offender believes the accused to be guilty, and indeed though the accused is in fact guilty and if the offence can be so committed in like manner a conspiracy so to commit the offence may be established ; but if one set of alleged conspirators know the charge to be false, and the other alleged cons-

59. Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249.

60. Annappa Bharamgauda (1907) 9 Bom. L. R. 347 : 5 Cr. L. J. 323.

61. Benoyendra (1936) 40 C. W. N. 432 : 37 Cr. L. J. 394 : A. I. R. 1936 C. 73 : 161 I. C. 74 [relying on Murphy (1873) 8 C. & P. 297.]

pirator has no such knowledge but believes the charge to be true, and it is his duty if true to pursue it, the inference of any concert between the two sets of conspirators is so far weakened as, measured by the standard of proof required in a criminal case, to disappear.⁶²

S. 124A I. P. C.

Sedition.—

Section 124A has been under judicial consideration by Sir Comer Petheram in *Q. E. Jogendra Chandra Bose*;⁶³ by Mr. Justice Strachey on the trial of *Bal Gangadhar Tilak* in the Bombay High Court;⁶⁴ by a Full Bench of the Bombay High Court, consisting of Sir Charles Farran, C. J., Mr. Justice Candy and Mr. Justice Strachey, on the application of *Bal Gangadhar Tilak* for leave to appeal to Her Majesty in Council;⁶⁵ by a Board of the Judicial Committee of Her Majesty's Privy Council, consisting of the Lord Chancellor Lord Hobhouse, Lord Davey, and Sir Richard Couch on the application of *Bal Gangadhar Tilak* for special leave to appeal to Her Majesty in Council;⁶⁶ and by Sir Charles Farran, C. J., Mr. Justice Parsons and Mr. Justice Ranade in the appeal of *Ram Chandra Narayan* and *Kishnaji Dhondu* from the order of conviction and sentence of the Sessions Judge of Satara in their case.⁶⁷ All these cases were reviewed by a Full Bench of the Allahabad High Court presided over by Sir John Edge, C. J. in *Q. E. v. Amba Prasad*.⁶⁸ The following extract from the judgment in the case last-mentioned will show how the Judge should charge the Jury in a trial under this Section.

"If there be any difficulty as to the true meaning of Section 124A of the Indian Penal Code, it is caused by the Explanation which forms part of that Section. In *Queen-Empress v. Jogendra Chandra Bose* it was contended by the Counsel for the accused persons that "disaffection" and "disapprobation" were synonymous words, and had one and the same meaning. On that contention it was observed by Sir Comer Petheram, and in our opinion, correctly, having regard to the question before him: "If that reasoning were sound, it would be impossible for any person to be convicted under the Section, as every class of writing would be within the explanation." Sir Comer Petheram thus defined "disaffection" and "disapprobation" as those words are used in Section 124A: "Disaffection means a feeling contrary to affection; in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action, and yet to like him. The meaning of the two words is so distinct, that I feel it hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention of creating such a disposition in his hearers, he will be

62. Dwarkanath (1933) 37 C. W. N. 514 (P.C.) 57
C. L. J. 117 : 35 Bom. L. R. 507 : 64 M.
L. J. 466 : 1933 A. L. J. 645 : 34 Cr. L. J.
322 : A. I. R. 1933 P. C. 65 : 142 I. C. 335.
63. (1891) 19 C. 35.

64. (1897) 22 B. 112.
65. (1897) 22 B. 112 at p. 147 (F. B.).
66. (1897) 22 B. 528 (P. C.).
67. (1897) 22 B. 152 (F. B.)
68. (1897) 20 A. 55 (F. B.)

guilty of the offence in attempting to excite disaffection within the meaning of the Section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the Section that the words used are calculated to excite feelings of ill-will against the Government, and to hold it up to the hatred and contempt of the people, and that they were used with the intention to create such feeling.

"The charge which was before the Jury in *Queen-Empress v. Jogendra Chundra Bose* was that the accused had attempted to excite feelings of disaffection to the Government established by law in British India, and was not that they had, in fact, excited feelings of disaffection to the Government established by law in British India; and it is in relation to that charge which was before the Jury that Sir Comer Petheram's direction to the Jury must be read. Later on, in his direction to the Jury, Sir Comer Petheram, in referring to the articles in respect of the publication of which the charges under Section 124A arose, said: "Were those articles intended to excite feelings of enmity against the Government, or, on the other hand, were they merely expressing, though in strong language, disapprobation of certain Government measures? You will bear in mind that the question you have to decide has reference to the intention, and, in fact, the crime consists of the intention, for a man might lawfully do the act without the intention. The evidence of the intent can only be gathered from the articles; ultimate object of the writer may be one thing, but if, in attaining that object, he uses, as the means, the exciting of disaffection against the Government, then he would be guilty under Section 124A. If you think that these people, with the object of procuring the repeal of the Age of Consent Act, or of increasing the sale of their paper, disseminated these articles, intending to excite feelings of enmity, you will be bound to find a verdict of guilty."

"Mr. Justice Strachey in his direction to the Jury in *Queen-Empress v. Bal Gangadhar Tilak* in explaining Section 124A in reference to the charges in that case before the Jury, said: "I agree with Sir Comer Petheram in the Bangobasi case, that disaffection means simply the absence of affection." If that sentence had stood alone, and was not explained by what followed, it would, no doubt, have constituted a misdirection. Disaffection necessarily implies an absence of affection, but a mere absence of affection is not disaffection within the meaning of Section 124A. Mr. Justice Strachey, in that part of his direction which immediately follows the sentence which we have quoted, made it perfectly plain what in his opinion disaffection, within the meaning of Section 124A, is. He said:—"It means hatred, enmity, dislike, hostility, contempt, and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite: he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial, except perhaps in dealing with the question of punishment. If a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the Section. In the next place, it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question.

It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will of course find him guilty. But if you should hold that that charge is not made out, and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged, not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the Section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite them; so that if you find that either of the prisoners has tried to excite such feelings in others, you must convict him, even if there is nothing to show that he succeeded. Again, it is important that you should fully realize another point. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within Section 124A, and would probably fall within other Sections of the Penal Code. But, even if he neither excited nor intended to excite any rebellion, or outbreak, or forcible resistance to the authority of the Government, that is sufficient to make him guilty under the Section. I am aware that some distinguished persons have thought that there can be no offence against the Section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion, that view is absolutely opposed to the express words of the Section itself, which, as plainly as possible, makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action, such as rebellion or forcible resistance, the test of guilty."

In directing the Jury as to the meaning and effect of the Explanation in Section 124A, Mr. Justice Strachey said :—

"Observe first that, as I have already said, while the first clause shows affirmatively what the offence made punishable by the Section is, the Explanation states negatively what it is not. It says that something 'is not disaffection' and 'is not an offence within this clause'. Therefore its object is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts which the first clause deals with. The next and most important point for you to bear in mind is that the thing protected by the Explanation is 'the making of comments on the measures of the Government with a certain intention.' This shows that the Explanation has a strictly defined and limited scope. Observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as 'making of comments on the measures of the Government.' It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the Epidemic Diseases Act, or any particular tax, or of administrative

measures, such as the steps taken by the Government for the suppression of plague or famine. But if you come to the conclusion that these writings are an attack, not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives, or its feelings towards the people, then you must put aside the Explanation altogether, and apply the first clause of the Section. In the next place, supposing that you are satisfied that these writings can fairly and reasonably be construed as 'comments on the measures of the Government', and not as attacks upon the Government itself, still you cannot apply the Explanation unless you believe that such comments were made with the intention of exciting only 'such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government, and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.' This, you will see, draws a distinction between attempting to excite feelings of 'disaffection' to the Government, and intending to excite only a certain species of 'disapprobation' of Government measures; and protects the latter only. What is the meaning of 'disapprobation' of Government measures as contrasted with 'disaffection' to the Government? I agree with Sir Comer Petheram that while disaffection means the absence of affection, or enmity, disapprobation means simply disapproval; and that it is quite possible to like or be loyal to anyone, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. This distinction is the essence of the Section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures, and he may do so severely, and even unreasonably perversely and unfairly. So long as he confines himself to that, he will be protected by the Explanation. But if he goes beyond that, and whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers, as, for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people, then he is guilty under the Section, and the Explanation will not save him.

"The object of the Explanation is to protect honest journalism and bona-fide criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. So long as a journalist observes this distinction, he has nothing to fear. It seems to me that this view of the law secures all the liberty which any reasonable man can desire, and that to allow more would be culpable weakness and fatal to the interest not only of the Government, but of the people. But now there are other words in the Explanation which we have still to consider. To come within the protection of the Explanation, a writing must not only be the making of comments on Government measures with the intention of exciting only disapprobation

of them as distinguished from disaffection to the Government, but the disapprobation must be 'compatible' with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.

"What that means is that even exciting disapprobation of Government measures may be carried too far. For instance, if a man published comments upon Government measures which were not merely severe, unreasonable or unfair, but so violent and bitter, or accompanied by such appeal to political or religious fanaticism, or addressed to ignorant people at a time of great public excitement, that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support the Government, and if it could fairly be gathered from the writing as a whole that the writer or publisher intended these results to follow, then he would be guilty under the Section and would not be protected by the Explanation. Observe the nature of this 'disposition' which makes the whole difference between a 'disapprobation' of measures which amounts to 'disaffection' to the Government and a 'disapprobation' which does not. It is not merely 'a disposition to render obedience to the lawful authority of the Government.' It is a disposition both to render obedience and also to support the lawful authority of the Government against unlawful attempts to subvert or resist it. And it is a disposition to support that lawful authority against unlawful attempts not only to 'resist' it, that is, oppose it, but also to 'subvert' it, that is, to weaken and undermine it by any unlawful means whatever. And lastly, it is a disposition to support the Government against all such unlawful attempts whenever occasion may arise, not only against any particular unlawful attempt, proceeding or impending at the time of the publication."

"In refusing the application of Bal Gangadhar Tilak to the Bombay High Court for leave to appeal to Her Majesty in Council, Sir Charles Farran, C. J. in delivering the judgment of the Full Bench, said :—

"The other ground upon which Mr. Russell has asked us to certify that it is a fit case to send to the Privy Council is that there has been misdirection, and he based his argument on one major and two minor grounds. The major ground is that the Section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the Section, and we need say no more upon that ground. The first of the minor points is that Mr. Justice Strachey, in summing up his case to the Jury, stated that disaffection meant the absence of affection. But although, if that phrase had stood alone, it might have misled the Jury, yet taken in connection with the context, we think that it is impossible that the Jury can have been misled by it. That expression is used in connection with the law as laid down by Sir Comer Petheram in Calcutta in the Bangobasi Case. There Sir Comer Petheram, instead of using the words 'absence of affection', said 'contrary to affection'; and if the words 'contrary to affection' had been used instead of 'absence of affection' in this case, there can be no doubt that the summing up would have been absolutely correct. Taken in connection with the context, it is clear that, by absence of affection, the Judge did not mean the negation of affection, but some active sentiment on

the other side. Upon that point we cannot certify that this is a fit case for appeal. In this connection, it must be remembered that it has not been alleged that there was a miscarriage of justice. The last point is in reference to the definition of the word 'Government'. It is a very minor point; but, striking out the words (which were not in the original charge) Mr. Russell has alluded to, we cannot see that there has been any misdirection as to the meaning of the word 'Government'. We, therefore, think the application must be refused."

"On the application of Bal Gangadhar Tilak to the Judicial Committee of Her Majesty's Privy Council for special leave to appeal to the Queen in Council, Mr. Justice Strachey's direction to the Jury was elaborately criticised by an eminent Counsel of the English Bar. In delivering the judgment of the Judicial Committee, the Lord Chancellor is reported to have said: "Their Lordships are of opinion, taking the view of the whole or the summing up, which is of very great length, that there is nothing in that which, in their Lordships' opinion, calls upon them to indicate any dissent from or necessity to correct, what is therein contained. Looking at the summing up as a whole, and looking at each part of what was said, by the light of what else was said, speaking generally of the argument which has been presented to their Lordships, they are of opinion that no case has been made out, consistently with the rules by which their advice to Her Majesty has been guided hitherto in giving leave to appeal in criminal cases, and, therefore, they will humbly advise Her Majesty that this is not a case in which leave should be granted."

"So far as we can form an opinion from the imperfect report before us of the judgments of the Bombay High Court in the Satara Case, we infer that Sir Charles Farran, C. J. held the same opinion as to the meaning and effect of Section 124A of the Indian Penal Code as was expressed by Mr. Justice Strachey in the case of Bal Gangadhar Tilak, and that an attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce political hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance. Sir Charles Farran apparently also held, and in our opinion rightly, that a man may be guilty of the offence of attempting to excite feelings of disaffection against the Government established by law in British India, although in the particular article or speech he may insist upon the desirability or expediency of obeying and supporting Government. The reports, which are before us, of the judgments of Mr. Justice Parsons and Mr. Justice Ranade in the Satara case are too imperfect to enable us to form an opinion as to their construction of Section 124A. If their construction of Section 124A differs materially from the construction placed upon that Section by Mr. Justice Strachey, it necessarily follows that their construction would not be accepted as correct by the Judicial Committee of the Privy Council, which accepted Mr. Justice Strachey's direction to the Jury in Bal Gangadhar Tilak's Case as a sufficient and not a misleading direction.

"In our opinion, any one who, by any of the means referred to in Section 124A of the Indian Penal Code, excites or attempts to excite feelings of hatred, dislike, ill-will, enmity, or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of "disaffection", as that term is

used in Section 124A, no matter how guardedly he may attempt to conceal his real object. It is obvious that feelings of hatred, dislike, ill-will, enmity, or hostility towards the Government, must be inconsistent with, and incompatible with a disposition to render obedience to the lawful authority of the Government, and to support that lawful authority against unlawful attempts to subvert or resist it. The "disapprobation of the measures of Government" may or may not, in any particular case, be the text upon which the speech is made, or the article or letter is written, but if, upon a fair and impartial consideration of what was spoken or written, it is reasonably obvious that the intention of the speaker or writer was to excite feelings of disaffection to the Government established by law in British India, then a Court or a Jury should find that the speaker or writer or publisher, as the case might be, had committed the offence of attempting to excite feelings of disaffection to the Government established by law in British India. To paraphrase is dangerous, but it appears to us that the "disaffection" of Section 124A is "disloyalty"; that is the sense in which the word "disaffection" has been generally used and understood during the century. We are further of opinion that the ordinary meaning of disaffection in Section 124A, having regard to the evils at which Section 124A strikes, is not varied by the Explanation contained in the Section.

"The intention of a speaker, writer or publisher, may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter, considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. Where it is ascertained that the intention of the speaker, writer or publisher was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did, in fact, excite such feelings of disaffection."

The Jury is to be directed not to consider the truth of the grievance, the bad taste of the article, or the delay in the prosecution and want of prosecution in other cases.⁶⁹

As regards the liability of the printer in a case of sedition, reference may be made to the case of *Phanendra Nath Mitter*⁷⁰ in which Rampini, A. C. J. said thus : "If the articles contain what you may consider a reasonable criticism of the action of Government in a particular matter without attempting to create hatred or contempt of Government, then of course the accused is not guilty under the Section. But if otherwise, then he will be guilty under the Section as having printed and published articles of a seditious nature". Speaking of the liability of the printer under S. 7 of Act XXV of 1867 he said,—"It (the Section) makes

69. Luxman (1899) 2 Bom. L. R. 286, 298;
Vinayek (1899) 2 Bom. L. R. 304.

70. (1908) 35 C. 945 ; 8 Cr. L. J. 438.

the printer responsible, whoever may be the writer of the articles in the paper, and therefore a prosecution may proceed against the printer. Mr. E. P. Ghosh has called our attention to the case of *Q. E. v. Bal Gangadhar Tilak* (1897) 22 Bom 112. It is an old case, as it is a case under the Penal Code before it was altered by the legislation of 1897. This is a case in which the provisions of S. 7 of Act XXV of 1867 have not been considered. There is another case, *Ramasawmi v. Lokanada* (1885) 9 Mad 387 which lays down much more clearly and correctly, I think, what the duty of an accused person is as regards the discharge of liability, which he lies under, under the Section. It has been distinctly said that according to the provisions of S. 7 of Act XXV of 1867 the onus is upon the accused person who is bound to prove the contrary. Now, gentlemen, you have to consider whether the accused has proved the contrary to your satisfaction. If he has, then you must acquit him. If he has not, then you must be justified in convicting him."

S. 147 I. P. C.

Rioting.—

The attention of the Jury must be called to the common object laid in the charge and it should be explained to them.⁷¹ They must be told to consider if there was evidence of such and what it was.⁷² In a case of riot it is essentially necessary to mention what an unlawful assembly is. The Jury are not experts in law, they might not be able to distinguish between a collection of five or more men *without* a common object and a collection of the same number of men *with* a common object.⁷³ The accused were charged under Ss. 147, 304/149, 325/149 and 323/149 I.P.C. The Judge in his charge said,—“If, therefore, the Jury find that a riot took place, they should, under S. 149, find every member of the unlawful assembly guilty of causing hurt or grievous hurt, etc’’. But he nowhere instructed the Jury what their verdict should be if they found that there was no unlawful assembly of 5 or more persons but that grievous hurt or hurt was caused by any one or more of the accused persons. The Jury acquitted two and convicted the remaining accused under S. 325. *Held*, that the Jury were misled by the charge of the Judge and the accused could not be convicted under S. 325 I. P. C., as they had not been called upon to meet such a charge, and it was not minor to, or included in a charge under S. 149/325 I. P. C.⁷⁴ Where the accused were charged under S. 147 I. P. C., with the common object of abducting the complainant’s wife with intent that she will be compelled, or knowing it to be likely that she would be compelled, to marry some one else against her will ; and they were also charged under Ss. 366 and 498 I. P. C., and the Judge directed the Jury that if they found that she was abducted by dragging her by the hand or the hair, then such abduction would amount to offences under Ss. 341 and 352 I. P. C. ;

71. Afiruddi (1919) 23 C. W. N. 833 : 29 C. L. J. 571 : 20 Cr. L. J. 661 : 52 I. C. 485 ; Mangan (1902) 29 C. 379 : 6 C. W. N. 292.
72. Abdul Razak (1894) Rat. 710.

73. Abdul Sheikh (1915) 17 Cr. L. J. 92 : 32 I. C. 684 (C).
74. Panchu Doss (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

and the accused was convicted of rioting under S. 147 and acquitted of the offences under Ss. 366 and 498 : *Held*, that there was no misdirection and that the conviction under S. 147, with the common object of abduction under circumstances constituting the offences under Ss. 341 and 352 I. P. C., was legal, as the latter offences were minor offences within S. 238 Cr. P. C., involved in the charge of rioting as actually framed.⁷⁵ In a case of rioting and hurt, the charge must satisfy three requirements :—(1) Defence of each accused must be considered ; (2) common object must be set out ; (3) case against each of the accused must be considered separately.⁷⁶ A common object may change in the course of an occurrence. A crowd may have a common object at one time and may have another common object as things develop and it may well be that there are various common objects in the course of an occurrence. In a trial before the Jury all these have to be placed before them in order that they may decide if any, and if so which of them, has been proved against the accused. There is nothing legally wrong in a charge to the Jury where the common object alleged is explained as one of disturbing the public peace and resisting, obstructing and over-awing the Police by criminal force and assaulting the Police.⁷⁷ The omission to state it correctly in the summing up does not vitiate the trial, if the accused is not prejudiced thereby.⁷⁸ Where a Sessions Judge in his charge to the Jury referred to two possible common objects of an unlawful assembly, one of which only had been set out in the charge-sheet : *Held*, that inasmuch as it was not possible to say which of the two common objects had been accepted by the Jury, and it might well have been that they had accepted the one which had not been charged, and which consequently the accused had not had an opportunity of meeting, the conviction must be set aside.⁷⁹

The common object alleged by the prosecution was to compel the payment of certain money by one of the persons of the opposite party. Some of the accused, who admitted their presence at the scene of the occurrence, stated that they had been attacked on account of an allegation being made that one of the opposite party had enticed away another's wife, and that they had merely acted in self-defence. On the close of the case for the prosecution the Sessions Judge, considering that possibly the common object alleged by the prosecution might be considered not to have been proved, amended the charge, and added an alternative common object to it, viz, that the object of the assembly was to punish one of the opposite party for enticing away another's wife. There was no evidence on the record to prove the alternative common object, it being based solely on a portion of the statements of some of the accused. The Sessions Judge put it to the Jury that it was an inference that could possibly be drawn from the evidence, but it was for them to draw that inference or not. The Jury convicted all the accused without specifying which common object they relied on, and were not asked under S. 303 Cr. P. C., any questions for the purpose of ascertaining what their

75. Torap Ali (1926) 53 C. 599 : 44 C. L. J. 239 : 27 Cr. L. J. 1314 : A. I. R. 1926 C. 1059 : 98 I. C. 386.

76. Tangaya (1925) 27 Cr. L. J. 1164 : A. I. R. 1927 M. 56 : 97 I. C. 748,

77. Abdul Gani (1924) 25 Cr. L. J. 1386 : A. I. R. 1925 C. 494 : 83 I. C. 346.

78. Rahamat (1900) 4 C. W. N. 196.

79. Sabir (1894) 22 C. 276,

verdict was based on : *Held*, that the Judge had misdirected the Jury, and that the verdict of the Jury leaving it uncertain what was the common object which actuated the accused, was bad in law and that the conviction must be set aside and the case retried.⁸⁰ In summing up a case under S. 147 I. P. C., where the common object alleged in the charge as framed was to take possession of the complainant's land and hut and to assault him and others named, and the prosecution and defence each asserted exclusive possession and an attack by the opposite party, the Judge put before the Jury a third alternative suggesting to them that the case might not be precisely as the prosecution alleged and at the same time might not be what the defence endeavoured to set up, but something between the two namely, that the complainant's party might have gone to turn the accused's party out of possession, that they were resisted and driven out of the land by the accused's party, that up to that point the latter might have been acting within their rights but that they went further and, intoxicated with success or anger or both, determined to teach the complainant's party a lesson and assaulted them. *Held*, that the suggestion was not improper.⁸¹

It is a misdirection to direct the Jury, in a case of rioting, to arrive at their verdict irrespective of the question of title to the disputed property, where the question of title to the same is most material.⁸² The Jury were told that a party, in peaceable possession of land and attacked by others in force, would be justified in resisting if they had no time to apply for the protection of the authorities and if they used no greater violence than was necessary ; and they were further told to apply the evidence to these points. It was *held* that this was the proper way to put the case before the Jury.⁸³ But where in a case under Ss. 147 and 148 I. P. C., the Judge told the Jury : "There can be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons, who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and the accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of a right of private defence ;" and generally told the Jury that in his view of the law no right of private defence existed and that it was unnecessary for them to decide which party were in *defacto* possession and which party were the aggressors : *Held*, that there was no misdirection.⁸⁴ Omission to state vital points on the question of possession is a material misdirection ;⁸⁵ but not when the defence is *alibi*.⁸⁶

Where there was evidence tending to show that the object of the offender may have been, in the first instance, revenge, and the charge of the Judge to the Jury failed to show that

80. Wafadar Khan (1894) 21 C. 955.

81. Samaruddin (1912) 40 C. 367 : 13 Cr. L. J. 821 : 17 I. C. 565.

82. Ahad Fakir (1924) 43 C. L. J. 245 : 26 Cr. L. J. 946 : A. I. R. 1925 C. 1235 : 87 I. C. 98.

83. Moorut Mahton (1867) 8 W. R. 3,

84. Kabiruddin (1908) 35 C. 368 : 12 C. W. N. 384 : 7 C. L. J. 359 : 7 Cr. L. J. 256.

85. Chhakari (1924) 26 Cr. L. J. 567 : A. I. R. 1926 C. 439 : 85 I. C. 711.

86. Keshab (1909) 9 C. L. J. 380 : 12 Cr. L. J. 498 : 4 I. C. 120,

the Judge guided the Jury to the necessity of discriminating between offences committed by the several prisoners, if different offences were committed, or determining whether all acted in pursuance of a common object, or that he pointed out, as required by S. 297 Cr. P. C., the law applicable to the facts before them, the verdict was set aside and a retrial ordered.⁸⁷ In an affray respecting land one of the aggressive party was killed. The prisoners, who were exercising the right of private defence of property, were acquitted by the Jury of culpable homicide, but convicted of rioting. The Jury substantially found that the riot was the result of deliberate collection of men by both parties ; further, that the scene of the riot was the field of the accused, and that the opposite party were the aggressors. It seemed that there had been litigations between the parties about the field and that the accuseds' right and possession had been legally decided in their favour. Upon the facts and the Judge's charge they acquitted the prisoners of culpable homicide and convicted them of rioting. The point urged was that the prisoners had been acquitted of culpable homicide and the opposite party had been found to be the aggressors on the field of their party, they were not members of any unlawful assembly but acted in self-defence, and that on this point the Judge misdirected the Jury. The High Court observed :—"The charge of the Judge was in substance (as regards the point of law) as follows : "If you think that the prisoners' party were the aggressors then you must find all those, who were present banded together for a common unlawful object, and of which homicide was the probable and actual result, guilty of culpable homicide. But if you think that the opposite party were the aggressors and that the prisoners and others turned out armed and prepared to fight in defence of their property it cannot be said that the turning out of an armed force of fifty men is a reasonable act in exercise of the right of private defence, and in that case you might convict them of the minor charge of riot only." Acting apparently on this last suggestion, the Jury convicted of riot. Now, the question is not whether there was a reasonable exercise of the right of private defence, but whether there was a lawful exercise of that right. The law is this (Sections 99 to 104 of the Indian Penal Code), that in certain circumstances (of which the mere defence of property against trespass is not one) the right of private defence extends to causing death ; and that, in other cases, the right extends to causing any harm "short of death ; subject in both cases to the general limitation of Section 99. Now, as in this case there was no right to cause death in defence of the property, the parties who killed the deceased are no doubt guilty of culpable homicide. I also think, it may well be that if several parties band together and so act in defence of property, the unlawful causing of death is a natural and probable result, and if death is, in fact, so caused, it would be very dangerous to hold otherwise than that they are all responsible and guilty of culpable homicide, of a low degree though it be. It may therefore be that if the Judge had so charged the Jury, the facts might have been found such as to justify a verdict of guilty of culpable homicide against the prisoners. Those, who indulge in such an excessive private defence, do so at their own risk. But if no death actually is caused, then the right of private defence is not exceeded. Are those banded for the defence guilty of any crime ? In this case the prisoners have been acquitted of the culpable homicide,

87. Komali (1886) 1 Weir 450 ; 2 Weir 515.

which places them in the same position as if there had been no culpable homicide, can they be convicted of rioting because there occurred a culpable homicide of which they are not guilty? I think not. In fact, they have not (as the finding stands) exceeded the right of private defence. But are they guilty of unlawful assembly and rioting as a separate question? See the definition of unlawful assembly (Section 141). The object of the assembly must be one of those specified. It must be either to commit some act which would be an offence independent of the assembly (and as the only offence of this kind was the culpable homicide, the prisoners are found not guilty of assembling with that object) or it must be by criminal force to take or obtain possession of any property or to enforce any right or supposed right. I think that the latter provision applies to an active enforcement of a right not in possession, and not to the defence of a right in possession. Therefore, I cannot see that the mere assembling in defence of property is an unlawful assembly, unless the persons assembling both intend to commit (or to run the extreme risk of committing) and actually do commit culpable homicide. In short, my view is that when parties in good faith act in defence of property, whether they be many or few, and whether they be all the actual owners, or whether some of them be assembled at the request of the owner in possession of the property, they must be guilty of culpable homicide or nothing. In this view I would quash the conviction as illegal and release the prisoners.⁸⁸

S. 148 I. P. C.

Rioting armed with a deadly weapon.—

It is only the actual persons who are armed with deadly weapons who can be charged under S. 148 I. P. C. Where a Sessions Judge's charge to the Jury showed that he was under the impression, acting under what he considered the analogy of S. 146 of the Code, that if one member of an unlawful assembly is armed with a deadly weapon or a weapon of offence the other members of the assembly could be charged under S. 148 I. P. C., the High Court pointed out that it was not so.⁸⁹

In Bishop's Criminal Law it is said :- "A deadly weapon is one likely to produce death or great bodily injury. The manner in which it was used in the particular instance may enter into the question whether or not it was deadly. Commonly, what is a deadly weapon is deemed to be a question of law for the Court, not of fact for the Jury. Yet, it may so far involve a fact as to be for the Jury; for example, where it is deadly or not according to the manner of its use."⁹⁰

88. Mitto Singh (1865) 3 W. R. 41.

89. Sabir (1894) 22 C. 276.

90. Vol. II, § 680.

S. 149 I. P. C.

Constructive guilt of a member of an unlawful assembly.—

Although the common object of an unlawful assembly is stated in the charge, the Sessions Judge ought, in commenting upon the provisions of S. 149 I. P. C., to draw the attention of the Jury expressly to the common object.⁹¹ The common object of an unlawful assembly was to take possession of crops by force; one J was charged under, amongst other offences, S. 302 and S. 302/109, i.e., committing murder and abetting murder by being a member of the unlawful assembly in the prosecution of the common object of which murder was committed by some other member and so guilty under S. 302 read with S. 149, and the other accused were charged under S. 302/149 for being members of the said unlawful assembly in the prosecution of the common object of which a murder was committed by J which they knew to be likely to be committed in the prosecution of the common object. The Judge gave no direction to the Jury upon the matter of the charge as framed, viz, that murder was such an offence as the members of the unlawful assembly knew to be likely to be committed in the prosecution of the common object. He summed up as if the charge alleged, which it did not, that murder had been committed in prosecution of the common object. The Jury convicted the other accused as being guilty on the ground that the offence of murder was committed in the prosecution of the common object. *Held*, that the Judge's misdirection led the Jury into error. Again, the charges alleged that the offence of murder was committed by J. The Judge gave no direction that if J be not found guilty of murder but found constructively guilty of it under S. 34 I. P. C., the other accused could not be convicted of S. 302/149, as if by double construction. *Held*, that the observations of the Judge were meagre and defective, and not calculated to give the Jury that assistance which they ought to have had in order to enable them to understand clearly the circumstances under which they would be justified in convicting the prisoners other than J constructively of the serious offence of murder, and that there must be a retrial.⁹² In a case of rioting attended with murder, where S. 149 I. P. C. is to be applied, the Judge should in his charge to the Jury place before them the special circumstances which would have brought the offence within the definition of murder. In a case where it was not put to the Jury in the charge whether any of the intentions mentioned in the Section were established against any of the accused, and the Exceptions 1, 2 and 4 were not explicitly explained to the Jury, and the Judge directed the Jury to find that if the offence of rioting were established all the accused were guilty of murder; *held*, that it was a misdirection.⁹³ Where the charges, as framed, were defective and the Judge's summing up showed that he did not direct the Jury to consider what, if any, was the common object of the assembly before the assault was committed, nor had he told the Jury that,

91. *Mangan* (1902) 29 C. 379; 6 C. W. N. 292;
Panchu Doss (1907) 34 C. 698; 11 C. W. N.
 666; 5 Cr. L. J. 427; *Mari Valayan* (1906)
 30 M. 44; 5 Cr. L. J. 78.

92. *Jhubboo Mahton* (1882) 8 C. 739.

93. *Mahmadkhan* (1907) 9 Bom. L. R. 153; 5 Cr.
 L. J. 168.

if the assault was committed in the absence of the accused, they must be satisfied that it was committed in pursuance of a common object which would make the assembly "unlawful" within the meaning of S.149 I. P. C., the conviction and sentence was set aside.⁹⁴ S.149 I. P. C., is sufficiently explained to the Jury, if the Judge has told them that if five persons go in a body with the common object of murdering a man, and if he is killed in the prosecution of the common object, then, no matter who struck the fatal blow, all are equally guilty of murder under Ss. 302/149 I. P. C.⁹⁵ Where, in respect of a charge under Ss. 302/149, the Sessions Judge told the Jury as follows: "This charge is to some extent redundant and strictly applies only to one accused A, for the other accused are supposed to have been the actual murderers. By S.149, A becomes a constructive murderer and liable for the substantive offence just as by S. 34 I. P. C., all the accused are equally liable for the murder as though each of them had committed it single-handed." *Held*, that this was a misdirection.⁹⁶ Considering that there has been much discussion and some difference of opinion, regarding the meaning of S. 149 I. P. C., it would certainly be better if the Judge explains that Section to the Jury somewhat fully,⁹⁷ though not as fully as explained in the Full Bench case of *Q. v. Sabid Ali*.⁹⁸ (There, it was held that S.149 is not intended to subject a member of an unlawful assembly to punishment for every offence which is committed by one of its members during the time they are engaged in the prosecution of the common object, and that in order to bring a case within S.149, the act must be done with a view to accomplish the common object of the unlawful assembly, or it must be proved that the offence, though committed in prosecution of the common object of the unlawful assembly, is one which the accused knew would be likely to be committed in prosecution of the common object). Where a trial Judge fails to explain the point of law to a Jury, viz, where the accused was charged only under S. 333 I. P. C., the conviction of those persons who are not proved to have caused any grievous hurt is not legally sustainable, the verdict of the Jury is liable to be set aside, in view of the misdirection by the Judge.⁹⁹ Where an accused is to be made liable for S. 304 (1) I. P. C., by the operation of S. 149 I. P. C., the Jury should be told to determine whether what was done by the actual assailant was in furtherance of the common object; and the omission to do so is a misdirection.¹⁰⁰ Where in a trial on charges under Ss. 147, 149/304, 149/325 and 149/323 the Judge in his charge to the Jury said,—"If, therefore, the Jury find that a riot took place they would under S. 149 I. P. C., find every member of the unlawful assembly guilty of causing grievous hurt or hurts," but nowhere instructed the Jury what their verdict should be if they found that there was no unlawful assembly but that hurt or grievous hurt was caused by one or more of the accused persons, *held*, that the omission amounted to a misdirection.¹⁰¹

94. Behari (1884) 11 C. 106.

95. Fanindra (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 1 I. C. 970.

96. Durga Charan (1922) 26 C. W. N. 1002 : 36 C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922 C. 124 : 68 I. C. 407.

97. Krishna Dhan (1894) 22 C. 377, 383.

98. (1873) 20 W. R. 5 (F. B.)

99. Lal Behari (1934) 11 O. W. N. 831 : 35 Cr. L. J. 1066 : A. I. R. 1934 O. 354 : 150 I. C. 509.

100. Chagan Rajaram (1912) 6 S. L. R. 116 : 13 Cr. L. J. 750 : 17 I. C. 62.

101. Panchu Doss (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

S. 150 I. P. C.**Hiring, etc. for unlawful assembly.—**

Where a person is charged with an offence under S. 304 read with S. 150 I. P. C., and the charge against him is a definite one of having engaged or employed a particular person to commit culpable homicide not amounting to murder and the Jury holds that the latter did not commit the culpable homicide, the person charged with having engaged or employed him cannot be convicted of constructive homicide under the provisions of S. 150 I. P. C.¹⁰²

S. 153A I. P. C.**Promoting enmity between classes.—**

The summing up of Cave, J. in *John Burns*¹⁰³ is a very clear and exhaustive treatment of the law of the offence of sedition and of exciting hatred amongst classes. The substance of it is that intention to incite ill-will between different classes of Her Majesty's subjects may be a seditious intention ; whether or not it is so in any particular case must be decided by the Jury after taking into consideration all the circumstances of the case.

S. 162 I. P. C.**Taking illegal gratification.—**

On a charge under S. 162 I. P. C., of attempting to obtain illegal gratification a conviction cannot be had if the evidence does not show the person or persons from whom the gratification was attempted to be obtained and the public servant who was to be influenced. In this case the only evidence was a letter which the prisoner admitted to have written to his employer and it was held that the construction which the prosecution put upon the passage should have been explained to the Jury.¹⁰⁴

S. 167 I. P. C.**Public Servant framing an incorrect record.—**

The gist of the offence is intention to injure. The prisoner was charged with framing an incorrect record, viz, that he, a Police Officer, entered the arrest of one T as an arrest of the 4th June instead of the 4th April. The prisoner said that he did not know that he had

102. Nayan Ullah (1924) 26 Cr. L. J. 594 : A. I. R. 1925 C. 903 : 85 I. C. 818.

103. (1886) 16 Cox. C. C. 355.

104. Setul Chunder (1865) 3 W. R. 69.

done anything wrong and that he did not look upon the taking of bail on the 4th April as an arrest. The Sessions Judge said in his charge that every man must be presumed to know the law. It was held,—“So he must in certain cases. But it does not follow that a criminal intent or knowledge is necessarily to be imputed to every man who acts contrary to the provisions of the law. Where, therefore, there was no evidence to establish the guilty knowledge, the Judge should have directed the Jury that the evidence would not support a conviction on a charge under S. 167 I. P.C.”¹⁰⁵

S. 176 I. P. C.

Omission to give information to Public Servant.—

Where the prisoner admitted that another prisoner came and proposed to him to take part in the dacoity but he refused to have anything to do with it, and the Sessions Judge in his charge to the Jury said that the prisoner is guilty, on his own confession, under S. 176 I. P. C., the High Court, without deciding the question whether the prisoner was legally bound to give information of what was communicated to him by the other prisoner, observed that taking the whole of his admission, he could not be said to have intentionally omitted to give such notice or information for the purpose of preventing the commission of the offence of dacoity, or in order to the apprehension of the offender, if it had not been shown that he, well knowing that a dacoity would take place, whether he joined in it or not, intentionally omitted to give information; it might well be that he was under the impression that his refusal to join would deter the other prisoner from committing the dacoity. It was held accordingly that the Sessions Judge should have told the Jury to find whether, upon the admission of the prisoner, a guilty intention to suppress information which was required for the purpose of preventing an offence could be legally inferred; not having done so, there has been a misdirection to the Jury, and the prisoner has been committed upon what is not legal evidence, and his conviction must be quashed.¹⁰⁶

S. 193 I. P. C.

False evidence.—

In cases of false evidence, reading extracts from the alleged conflicting statements of the prisoner is not sufficient to enable the Jury to form a fair opinion on the question. The whole of the deposition given on each occasion ought to be laid before the Jury.¹⁰⁷ Where O deposed that he and R were 4 days in company at M, and the Judge charged the Jury that, if they found that R was not in company with O during those

105. Nobokisto (1867) 8 W. R. 87, 92.

106. Lahai (1857) 7 W. R. 29.

107. Kally Churn (1866) 6 W. R. 92.

4 days at M, but was at S, it did not matter where O was, because it was clear that he could not have been in company with R and M, and must therefore have given false evidence when he said that he was during those 4 days in such company at M : *Held*, by the majority of the Court, that there had been no misdirection.¹⁰⁸ The Judge charged the Jury in the following words :—"The charge against the prisoner is that he intentionally made a false statement before the Magistrate by saying that his son F was sick at home that day, the 3rd Pous. An enquiry was made next morning, and the witnesses state that, when they went with the Constable to his house he himself said that his son was not at home, and he could not tell where he was to be found. What prompted the prisoner to adopt this course is not easy to see, but with that you have no concern ; if you believe that the witnesses are speaking the truth when they say that the prisoner on the morning of the 4th could not tell where his son was to be found, there is presumptive evidence of the strongest character that his statement of the previous day was a deliberate false statement". *Held*, that there was a manifest misdirection and error in law in the direction to the Jury to convict on what was not evidence, for it is obvious that the prisoner's inability to say where his son was on the 4th Pous, is not only no presumptive evidence, but is no sort of evidence at all, that the prisoner spoke falsely when he said that his son was ill at home on the 3rd Pous, the day previous.¹⁰⁹ The question of intention is one for the Jury.¹¹⁰ On a charge of giving false evidence, the Judge ought to direct the Jury to consider most carefully the intention with which the statements were made, if they thought that the statements were in fact made ; the intention is all important in every case of giving false evidence, and no Jury are fairly or rightly directed, unless their attention is specially called to this. An offence under S. 193 I. P. C., is not necessarily committed because the two statements are contradictory ; the necessary criminal intention must also be proved to exist.¹¹¹ Where no notice of the explanation given by the accused as regards the two statements was taken, nor was the point laid before the Jury ; *held*, that the omission was a misdirection.¹¹² Erroneously telling the Jury that the statement was made in the course of a judicial proceeding, when, in fact, it was not made at any stage of a proceeding which could terminate in a judgment, is a misdirection.¹¹³

On the trial of a person charged with perjury by making two contradictory statements the Judge charged the Jury as follows : "Before you can find him guilty, you must be satisfied that he made one or other of the statements contained in the charge, knowing that such statement was false and deliberately intending to make a false statement." The High Court observed—"The Jury were told and very properly etc. * * * After such a summing up, calling the attention of the Jury so plainly to the necessity of their being satisfied that one or other of the statements was known to be false, and that the accused

108. Rammoni (1867) 7 W. R. 69.

109. Sheikh Tufani (1867) 8 W. R. 26.

110. Rookni Kant (1865) 3 W. R. 58.

111. Denonath (1868) 9 W. R. 52.

112. *Ibid*.

113. Bykunt (1866) 5 W. R. 72.

deliberately intended to make a false statement, I think there can be no doubt that the offence of giving false evidence within the meaning of the Section 191 of the Penal Code was committed on one or other of the occasions specified in the charge. * * * Again, if it is necessary for the Jury, in order that the conviction shall be valid, to say which of the two statements is the false one, it is requiring the Jury to find what is not alleged in the charge. All that the charge alleges is that one of the statements was known or believed to be false or not believed to be true, and that thereby the offence was committed. Such a charge being authorized by the law, it appears to me that all which the Court has to find to sustain a conviction for giving false evidence is that the allegations in it are proved.¹¹⁴

Where, in a case which did not depend upon expert evidence, the Judge told the Jury that the true rule is that no man can be convicted of giving false evidence except on proof of facts which, if accepted as true, showed not merely that it is incredible but that it is impossible that the statements of the party accused made on oath can be true, without explaining how far this *dictum* was applicable to the evidence then before the Jury; *held*, that it was a misdirection.¹¹⁵

A sworn interpreter is only required when his services are required by the Court (*vide* S. 431 of Act XXV of 1861) and consequently only when the Judge and Jury are ignorant of the language in which a witness is deposing; and a certificate or memorandum under S. 199 is enough to show that the statement was properly interpreted to the party making it. Where, therefore, a Sessions Judge told the Jury that the absence of proof of sworn interpretership might affect the credibility to be attached to a document representing what the accused, as witness, had said; *held*, that it was a misdirection, but that the general question of credibility, namely whether the accused did or did not make the statement contained in the document, would remain for the Jury.¹¹⁶

The rule of English Common Law that the testimony of a single witness is not sufficient to sustain an indictment for perjury is not a safe guide for the Indian Courts which are bound by the statute law of India.¹¹⁷

S. 194 I. P. C.

Giving or fabricating false evidence to procure conviction of a Capital offence.—

The charge that was drawn against the accused was, with having made statements in their depositions "which they knew or had reason to know to be false". *Held*, that the

114. Mahomed Humayoon (1874) 21 W. R. 72. (F. B.): 13 B. L. R. 324 (F. B.). *See also* Gonowri (1874) 22 W. R. 2.

115. Sanjiram (1930) 58 C. 96 : 32 Cr. L. J. 10 : A. I. R. 1930 C. 370 : 127 I. C. 657.

116. Mudun Mundle (1871) 16 W. R. 71.

117. Arjun Singh (1931) 53 A. 598 : 32 Cr. L. J. 730 : A. I. R. 1931 A. 362 : 131 I. C. 594 [distinguishing Abdul Aziz v. Tara Chand (1921) 22 Cr. L. J. 304 : A. I. R. 1921 A. 86 : 60 I. C. 800.]

charge was drawn incorrectly : a man may make a statement in the belief that it is true, though good reasons exist for knowing it to be false, for, unfortunately, men's beliefs are not always influenced by good reasons ; and that the charge should have been drawn in conformity to S. 191 I. P. C. viz, "making a statement which he either knows or believes to be false and does not believe to be true". Where, however, the Judge in summing up read to the Jury the words of the Code, and though criticism was addressed to a particular passage in his address which appeared to indicate that a witness might be guilty of perjury if he omitted to tell the whole truth, the Judicial Committee, taking as a whole the direction on this part of the law, found no reason to suppose that the Jury were in any way likely to be misled.¹¹⁸

Ss. 201, 202, 203, 204 and 218 I.P.C.

Offences against Public Justice.—

A Sessions Judge in his charge to the Jury said : "The two essential points which remain to be proved before a conviction can pass on any of the three Sections (Ss 201, 202 and 203 I.P.C.) are : 1st. the substantial fact of an offence having been committed, and 2nd. the knowledge or reasonable belief on the part of the accused that such was the case ; both these are essential parts of the offences specified in the charges against the accused." The High Court observed : "Both these points are not necessary in order to constitute a legal conviction under Ss. 201, 202 or 203 I.P.C., for if a person has reason to believe (S. 26) that an offence has been committed, and acts in the manner described in either of those Sections he would be liable to punishment, even although it might subsequently transpire that he was mistaken in his belief."¹¹⁹

Where the prisoner, a Police Officer, is charged for giving false information (S. 201 I.P.C.), or with framing a report incorrectly (S. 218 I.P.C), with intent to save offenders from punishment, the issue to be tried is not whether such alleged offenders were in fact guilty or not, but merely the belief and intention of the prisoner in respect to their guilt. It was, therefore, a misdirection on the part of the Judge when he put before the Jury, as a matter to be considered by them in arriving at their verdict, the fact that the two offenders were subsequently brought to trial and condemned. Their subsequent conviction was no evidence at all as against the prisoner that they were in truth guilty, and if it had been evidence of their guilt, such evidence was, for the purpose of the trial as against the prisoner, irrelevant, as it was wholly immaterial whether they were guilty or not.¹²⁰

Removal of the corpse of a murdered man from the place of murder to another place is not causing the disappearance of some evidence of commission of the murder and thus

118. Dwarkanath (1933) 37 C. W. N. 514 (P. C.) :
57 C. L. J. 177 : 35 Bom. L. R. 507 : 64 M.
L. J. 466 : 1933 A. L. J. 645 : 34 Cr. L. J.
322 : A. I. R. 1933 P. C. 65 : 142 I. C. 335.

119. Ekramuddeen, Cr. Lett. dated 6th January
1855 : 2 W. R. Cr. Lett. 1.

120. Hurdut Surma (1867) 8 W. R. 68.

does not come under S. 201 I.P.C., which requires causing the disappearance of some evidence of the commission of an offence. So, where the charge was under S. 201 I.P.C., on the allegation that the accused had removed the corpse from one place to another with a view to screening the offenders and the above real meaning of the Section was not placed before the Jury, it was held that the trial was vitiated by misdirection.¹²¹

The word "information" in S. 202 means something which the person reporting knows, or has reason to believe to be true, and not any vague surmises which the people around him may have put into his head. So, when the prisoner was charged with having sent a messenger to the Thanah to report the occurrence of a dacoity with murder and not to mention any names though he was aware at the time that J, one of the dacoits, was recognised at the time by his voice, and the Judge charged the Jury that if they believed these facts then to find the prisoner guilty under Ss. 202/109: *Held*, that it was a clear misdirection; for unless it was shown that the prisoner had good reason to know that J had been engaged in the murder, simply telling the messenger not to mention any names would not be sufficient to convict the prisoner of intentionally omitting to give such information as would have prevented J from being brought to justice.¹²²

S. 206 I. P. C.

Fraudulent removal or concealment of property.—

The charge of the Sessions Judge to the Jury with reference to this Section was as follows: "It seems to me, according to the words of S. 206 I.P.C., to be quite immaterial whether A and K had any other property which might have been taken in execution of S's decree, besides this decree obtained by them against J. The question for you to decide is the absence or otherwise of intention to defraud". *Held*, that this charge involves a material misdirection.¹²³

S. 211 I. P. C.

Instituting a false charge.—

The Judge in his charge to the Jury told them that if they believed that the prisoner had just and lawful ground for instituting the prosecution, they must acquit him, even if they believed that the charge of dacoity was false. *Held*, that the proper question to leave to the Jury would have been that, unless they believed that the prisoner knew that he had no just or lawful ground for instituting these proceedings, they must acquit him.¹²⁴ Where a Judge in his charge to the Jury does not insist on the guilty knowledge, that is, on the knowledge that

121. *Nagendra* (1932) 37 C. W. N. 348 : 35 Cr. L. J. 535 : A. I. R. 1934 C. 144 : 147 I. C. 1028.

122. *Jaffir Ali* (1873) 19 W. R. 57, 65.

123. *Dinabandhu* (1897) 2 C. W. N. xci.

124. *Pran Kissen* (1866) 6 W. R. 15.

there was no cause for instituting the charge at all, he misdirects the Jury. It is essential for the conviction of a prisoner on a charge under S. 211 I. P. C., that it should be shown that he was well aware that he was bringing a false and malicious accusation.¹²⁵ Case against the accused was for bringing a false charge of dacoity. The Judge's charge to the Jury concluded with these words :—"I now leave the case in your hands. If you believe the charge of dacoity to be false, then you should find the prisoner guilty under S. 211 I. P. C., otherwise you should acquit him." *Held*, that the charge was erroneous and defective ; the Judge should have placed before the Jury all the elements which constitute the offence under the Section and the Jury should have been asked to say whether the charge was false and whether in instituting the charge there was no just or lawful ground.¹²⁶

Where the Judge in his summing up asked the Jury to convict the accused of an offence of abetment of S. 211 I. P. C., where there was no evidence of abetment of the complaint and the only evidence was that the accused had given evidence in support of the complaint : *Held*, that it was a misdirection, and the fact that he gave evidence was no proof of abetment ; *held also*, that the offence of abetment must be committed either before or at the time when the act abetted is committed, and there is no abetment of an act after it has been committed.¹²⁷

S. 243 I. P. C.

Possession of counterfeit coin.—

The Jury's attention was directed by the Judge only to the question, viz. whether the accused was, fraudulently or with fraudulent intention, in possession of the counterfeit coins, having known at the time he became aware of the possession that the coin was counterfeit. *Held*, that this was a misdirection. To constitute an offence under S. 243, it is essential to prove that at the time the accused became possessed of the coin he knew it to be counterfeit, whether he was in possession of the coin himself, or his wife, clerk or servant was in possession of the coin on his account.¹²⁸

Ss. 299-300 I. P. C.

Culpable homicide and Murder.—

In charging the Jury the Judge should follow the directions given by the Calcutta High Court in the following Criminal Letter :—¹²⁹ "In future, when convicting any person under trial before you of culpable homicide not amounting to murder, you should be

125. *Nobokisto* (1867) 8 W. R. 87.

126. *Tomij* (1897) 1 C. W. N. 301.

127. *In re Jugut Mohini* (1881) 10 C. L. R. 4.

128. *Fateh Chand* (1916) 44 C. 477 (F. B.) : 21

C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945.

129. *Jassaora*, Cr. Lett. dated 30th January 1865 : 2 W. R. Cr. Lett. 11.

careful to specify in your directions to the Jury, and to require them to specify in their finding under which of the exceptions described in Section 300 of the Penal Code the offence fell. Similarly, to enable you to fix the degree of punishment to be awarded, the Jury should be required to state the description of culpable homicide not amounting to murder of which they convict the accused, as a reference to Sections 299 and 304 of the Penal Code and to the Court's Circular No. 6 of 1863 will show you the necessity of being precise on the point * * It is not clear that you fully understand the difference between culpable homicide amounting to murder and culpable homicide not amounting to murder. The Court think it necessary to point out that under the Penal Code, all acts by which death is caused, done with certain knowledge or intention (See Section 300), constitute culpable homicide amounting to murder. Culpable homicide not amounting to murder is death caused with the same knowledge or intention but under one of the exceptional circumstances specified in Section 300 of the Penal Code. If the particular knowledge or intention exist and the case does not fall under any of these exceptions, the crime is murder. If, however, as in the case under consideration, this knowledge and intention are both wanting and death is caused by an act which is not justifiable under the Penal Code, the offender should be convicted of the minor offence of voluntarily causing grievous hurt (S. 325 of the Penal Code)."

"You should in future explain to the Jury that if a man does an act with a knowledge that it is likely to cause death, and death ensues, the law will presume that he intended the result of that act which he did with the full knowledge of what that result was likely to be, and that, therefore, in such a case the crime would be murder."¹³⁰

Where a Judge said,—“It is evident from the definition of Ss. 299 and 300 I. P. C., that if the prisoner knew that the club now in Court was likely to cause some injury likely to cause death, and if he intentionally used the weapon, even if he had no intention of causing H's death, still he is guilty of murder.” It was pointed out,—“This, in the Court's opinion, is not the law as laid down in S. 300 (nor apparently would an act so done be even culpable homicide under S. 299); otherwise, if a man having a sledge-hammer in his hand were to drop it on the toe of another, intending to inflict slight hurt in the way of a pinch, and an injury was thereby caused and mortification supervened so that the injured person died, the person who inflicted the hurt would be guilty of murder.”¹³¹

On a conviction on a charge of culpable homicide not amounting to murder, one of the objections on the ground of misdirection was that the Judicial Commissioner was wrong in telling the Jury that the doctor was of opinion that the lungs of the deceased must have sustained some severe injury during life; whereas the evidence of the doctor was that the deceased might have died from rapid inflammation produced by natural causes. The contention was upheld. It was said :—“We think that the Judicial

¹³⁰. Maigap, Cr. Lett. No. 1105, dated the 11th December 1865 : 4 W. R. Cr. Lett. 9.

¹³¹. Hurra Kisto, Cr. Lett. No. 1006, dated 31st August 1867 : 8 W. R. Cr. Lett. 20.

Commissioner ought to have left the cause of death as a distinct question to the Jury, pointing out the two theories suggested by the doctor from the post-mortem examination, and how each of these theories was supported or otherwise by the other evidence in the case."¹³²

Where a prisoner is on his trial by a Jury upon a charge of murder, it is the duty of the Judge to point out to the Jury accurately the difference between murder and culpable homicide not amounting to murder, and to direct the attention of the Jury to the evidence, and to leave them to find the facts and say (under the direction of the Judge as regards the law) of what offence the prisoner is guilty. Where the Judge merely states that in his opinion certain facts are proved, and that this amounts to the offence of murder, and then he puts it upon the Jury, if they do not agree with him, to say under which of the exceptions of S. 300 the case falls, without apparently attempting to explain to them the difference existing between murder and culpable homicide not amounting to murder, or to call their attention to the evidence necessary to establish these offences respectively: *Held*, that there has not been a proper summing up of the evidence by the Judge and practically the case has been tried and decided by the Judge alone; and the conviction under S. 302 I. P. C. must be set aside and a retrial ordered.¹³³ The Jury are not entitled to pronounce what is the law or to give their own definition of what constitutes "murder". So, where there was no misdirection by the Judge on the point of law, the finding of a Jury that, although the accused killed the deceased, the crime was not murder, not because it fell under any of the exceptions allowed by law, but because the accused had no object in killing him, is not a legal finding, and does not amount to a conviction of culpable homicide not amounting to murder.¹³⁴ A Judge should not charge the Jury as to what constitutes murder in this brief way: "Murder is the intentional killing of another human being with malice aforethought". This is a misdirection. It will be a ground of reversal, if this misdirection occasions a failure of justice. It is usual to refer to the Section which relates to culpable homicide and to direct the Jury as to what is culpable homicide and in what circumstances culpable homicide amounts to murder.¹³⁵ And the Jury should be left to find whether the facts established the offence of S. 302 or S. 304 or a lesser offence.¹³⁶

The omission by the Judge to lay specifically before the Jury, in a case of culpable homicide, the question whether in causing death, the accused had the intention to cause death or such injury as was likely to cause death, or the knowledge that he was likely to do so, though in the earlier part of the charge he had explained generally the terms "murder" and "culpable homicide" and had pointed out the distinction, is

132. Kali Churn (1867) 7 W. R. 2.

133. Shumshere (1868) 9 W. R. 51.

134. Uckoor (1864) 1 W. R. 50.

135. Durga Charan (1922) 26 C. W. N. 1002 : 36 C. L. J. 171 : 23 Cr. L. J. 567 : A. I. R. 1922

C. 124 : 63 I. C. 407. See also Jhubboo Mahton (1882) 8 C. 739, 750 ; Babya (1899) 1 Bom. L. R. 784 ; Dadubhai (1895) Rat. 766.

136. Babya (1899) 1 Bom. L. R. 784 ; Pandu (1900) 2 Bom. L. R. 334.

a material misdirection.¹³⁷ Where the Judge had not explained to the Jury the difference between murder and culpable homicide and the way in which he left the matter to the Jury was in effect, this: 'He has carefully described to them the effect of S. 34 I. P. C., and he has said that the Jury ought to be satisfied in order to convict the accused that the two accused persons caused the death of A with a common intention either of "causing his death or of causing such injury to him as they knew was likely to cause his death'. And a similar direction was given with reference to the charge under S. 326 I. P. C. But he did not say anything by way of direction to the Jury about any other possibility lying between murder on the one hand and grievous hurt on the other; as for instance, the accused's act coming within any of the exceptions mentioned in S. 300 I. P. C., or not. *Held*, that it cannot be said that the insufficiency in the charge has led to no injustice.¹³⁸ The omission to explain the special circumstance bringing the offence within the definition of murder, to put the question of intention and to explain explicitly Exceptions (1), (2) and (4), was held to be a misdirection.¹³⁹ Where the conviction was on a charge of culpable homicide not amounting to murder, it did not matter much that the Judge did not properly explain in his charge to the Jury the distinction between culpable homicide and murder.¹⁴⁰ Where the only charge against the prisoner was under S. 302 I. P. C., and the Judge told the Jury that their duty, after considering the question of provocation, was only to acquit or convict of the charge of murder: *Held*, that this direction was wrong. He should have pointed out to them the provisions of S. 238 Cr. P. C., that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he was not charged with it; the Jury were not bound to find a simple verdict of guilty or not guilty.¹⁴¹ In case of death and hurt caused by arsenic poisoning, the Judge must warn the Jury that before drawing inferences against the accused, they must first be satisfied that he knew of the presence of arsenic in the sugar and the evidence negated the possibility of accident or mistake.¹⁴² In cases of disease and injuries not ordinarily fatal, omission to direct the Jury to find whether there was knowledge of the injuries being likely to cause death, or intention to cause it, is a serious misdirection.¹⁴³

In a trial on a charge of murder at the Criminal Sessions of the Chief Court of Lower Burma, the presiding Judge omitted to explain to the Jury the distinction between murder and culpable homicide, or upon what views of the facts the accused had committed the one offence or the other. The charge to the Jury also suggested that a strong inference should be drawn against the accused from the fact that he had failed to take steps to bring to

137. Natabar (1908) 35 C. 531 : 12 C. W. N. 774 : 7 C. L. J. 599 : 8 Cr. L. J. 6.

138. Jahur Sheikh (1926) 30 C. W. N. 912 : 45 C. L. J. 20 : 27 Cr. L. J. 1402 : A. I. R. 1926 C. 1407 : 98 I. C. 714.

139. Mahmadvhan (1907) 9 Bom. L. R. 153 : 5 Cr. L. J. 168.

140. Krishnadvhan (1894) 22 C. 377.

141. Devji Govindji (1895) 20 B. 215.

142. Ofel Mollah (1913) 18 C. W. N. 180 : 15 Cr. L. J. 147 : 22 I. C. 723.

143. Ainuddi (1921) 34 C. L. J. 515, 516 : 23 Cr. L. J. 344 : 66 I. C. 1000.

justice a person who, it had been suggested, was the real offender. *Held*, that in both respects the charge to the Jury contained material misdirections.¹⁴⁴

A Full Bench of the Lower Burma Chief Court¹⁴⁵ laid down :—"An omission on the part of a Judge to explain to the Jury the difference between murder and culpable homicide not amounting to murder is not in every case a material misdirection (ref : to *Hla Gyi v. E*, 3 Cr. L. J. 1). The statements of law in the illustrations used in the Act cannot be taken as laying down substantive law ; they merely go to show the intention of the framers of the Act and may be useful, if correct. The only express provision as to the duty of a Judge in charging the Jury is that in S. 297. It is not incumbent on the Judge to explain a part of the law to the Jury, which if they acted on they would have gone wrong. Before a Judge leaves a case to the Jury for finding as to whether the accused's case comes within one of the exceptions to S. 300 I. P. C., there must be evidence, at least an allegation, by the accused on which they might reasonably and properly conclude the facts to be established. It is not the duty of the Judge to invent facts in the interest of accused persons." In the same case it was *held* by Twomey, J.—"When the facts appearing in a case are consistent only with an intention to cause death or to cause bodily injury sufficient in the ordinary course of nature to cause death, the offence can only be murder, and in such a case it would clearly be misleading to discuss culpable homicide done with a lesser criminal intention. In doubtful cases of murder a Judge is bound to explain the law as to the minor offence of culpable homicide not amounting to murder as well as the major offence of murder." *Held*, per Parlett, J.—"It is quite possible to explain fully and correctly what murder is without stating what it is not. A Court is bound to presume the absence of circumstances bringing the case within an exception unless and until the existence of those circumstances is proved or at least alleged. If there is material only for some of such circumstances but not others, it would not be right for a Judge to raise the applicability of the exception before the Jury as by doing so he might mislead them into contravening S. 105 of the Evidence Act."

In a recent decision of the Judicial Committee it has been *held*, that it is wrong to treat a case as one of murder or nothing, on the footing that homicide being proved malice is to be presumed ; that the law as to such presumption has been recently explained and largely qualified by the decision of the House of Lords in *Woolmington's Case* [(1935) A. C. 462] ;^{145a} and that it never could be maintained that where the evidence for the prosecution points affirmatively no further than manslaughter the law would enlarge the proof and transform the case into one presumptively of murder.^{145b}

The mere fact that the accused persons do not admit their presence at the occurrence and do not raise a case of provocation or of that of passion or something of that sort does not render it unnecessary to give the Jury a proper direction as to the exceptions in S. 300 I. P. C.

144. *Hla Gyi* (1935) 3 L. B. R. 75 : 3 Cr. L. J. 1.

145. *Nga Mya* (1915) 8 L. B. R. 306 (F.B.) :
17 Cr. L. J. 49 : 32 I. C. 641.

145a. See this case noted fully under Heading

Directions as to onus of proof, in Part II
Chap. VII, *ante*.

145b. *Mahadeo* (1936) 40 C. W. N. 1164 (P. C.)

The question is whether on any reasonable view of the facts, certain of the exceptions can matter. If they can matter and if a proper direction is not given to the Jury, then it is not open to the Court to guess and gamble as to whether or not the Jury's verdict would have been different.¹⁴⁶ But in the absence of any direct evidence of grave and sudden provocation or of the facts from which this exception can be legitimately inferred, the Judge was correct in excluding enquiry into the exception; under S. 105 of the Evidence Act the Court has to regard the absence of grave and sudden provocation as proved until the contrary is proved by the accused on whom the *onus* lies.¹⁴⁷ Where the assailant came and first abused and then attacked the party who were lawfully engaged in cutting *dhan*, receiving no provocation which could have justified the attack beyond a return of the abuse which usually passes on such occasions, it was observed that the Judge should have told the Jury that to bring the case within the exception to S. 300, the prisoner must have been deprived of the power of self-control by grave and sudden provocation, there ought to have been sufficient cause for such loss of self-control and the provocation was not voluntarily provoked by the prisoner as an excuse for doing harm.¹⁴⁸

S. 304 I. P. C.

Culpable homicide not amounting to murder.—

Where in charging the Jury the Sessions Judge after explaining Ss. 302 and 304 I. P. C., eventually said: "If, however, you find the accused had neither the intention nor the knowledge requisite under S. 302, consider his liability under S. 304. If you hold that he intended to cause the deceased such bodily injury that death would be a *possible* but not *the most probable* result you will find him guilty under S. 304, Part I; or if you hold that he had no such intention but knew as a reasonable man that death would be a *likely* consequence of his act you will find him guilty under S. 304, Part II". Held, that the direction was wrong. It would have been quite correct if the Judge had not used the word "possible" but had adhered to the words of the Section and had used the word "likely".¹⁴⁹ In a trial under Ss. 302, 304 and 326 I. P. C., the charge to the Jury is defective in law where it does not sufficiently ask the Jury to consider the intention of the accused; the considerations that should guide the Jury in arriving at it are the accused's frame of mind, the nature of the weapon used and also the number and nature of the wounds. For the ascertainment of the intention the eye-witnesses should be examined at length as to how the accused, at the

146. Jahur Sheikh (1926) 30 C. W. N. 12; 45 C. L. J. 20; 27 Cr. L. J. 1402; A. I. R. 1926 C. 1107; 98 I. C. 714.

147. Upendra (1914) 19 C. W. N. 653 (F.B.); 21 C. L. J. 377; 16 Cr. L. J. 561; 30 I. C. 113. See also Nga Mya (1915) 8 L. B. R. 306 (F.B.); 17 Cr. L. J. 49; 32 I. C. 641.

148. Ganesh Luskur (1868) 9 W. R. 72; Mahmadkhan (1907) 9 Bom. L. R. 153; 5 Cr. L. J. 168. See also Devji Govindji (1895) 20 B. 215.

149. Natabar (1929) 34 C. W. N. 223; 50 C. L. J. 476; 31 Cr. L. J. 572; A. I. R. 1930. C. 136; 123 I. C. 751.

time of inflicting the injury, acted.¹⁵⁰ In charging a Jury in a case of culpable homicide not amounting to murder, a Judge should call upon the Jury to state which description of culpable homicide they consider the accused to have committed ; S. 304 I. P. C. prescribing different punishments for that offence, Where the Judge omitted to require the Jury to do so, it must be held that the conviction was for the lighter offence. In such a case the High Court reduced the sentence from transportation for life to ten years' rigorous imprisonment.¹⁵¹ The Judge gave the following explanation of S. 304 I. P. C., to the Jury :—"The first part relates to death which is caused without any intention of causing death or causing such bodily injury as is likely to cause death. The second part relates to death which is caused without any intention to cause death or to cause such bodily injury as is likely to cause death, but with the knowledge that such injury may lead to death." *Held*, that the explanation was wrong and the mistake so palpable that it was a good ground for ordering retrial.¹⁵² The prosecution case was that the deceased was, on the night of the offence, reciting prayers in a very small temple situated in the centre of a compound where a large number of people resided, that about 2 A.M. the three accused, all of whom had quarters in the compound, came out of the house of one of their number and made for the temple, that one of them picked up a stone weighing 195 tolas near the temple and with it struck the deceased several blows on the head ; the other two were carrying, one a small stick and the other a piece of wood shaped like a small cricket bat, weighing 30 tolas, used by dhobis for beating clothes. The injured man died soon after from the rupture of one of the meningeal arteries. It was said : "The charge was under S. 304 (1) ; it was merely alleged by the prosecution that the assailant intended to cause such injury as was likely to cause death ; nor was it imputed to him that he actually knew that the injury which he intended to inflict was likely to cause the death of the particular person, the deceased. Had such knowledge been imputed the charge would properly have been of murder (S. 300, secondly). Where, as in the present case, death has been caused by a blow with a weapon, that does not necessarily suggest an intention to cause such bodily injury as would in the ordinary course of nature cause death, and it is presumed in accused's favour that he had no knowledge that the injury which he intended to cause was likely to cause the death of the person injured, and the circumstances are such that an intention merely to cause hurt dangerous to life might not unreasonably be inferred, we are of opinion that the Jury should be directed that it is open to them to find the accused guilty of the lesser offence, namely of causing grievous hurt under S. 320 cl. (8). We consider that S. 304 (2) is not appropriate to a case where there was a deliberate intention to inflict bodily injury to the person whose death resulted from such injury ; but we consider that the omission to put the case of grievous hurt under S. 320 cl. (8) to the Jury was a misdirection.¹⁵³ An imperfect statement of the elements constituting an offence under Cl. 1 of S. 304 I. P. C.,

150. Kya Nyun (1913) 8 L. B. R. 125 : 17 Cr. L. J. 154 : 33 I. C. 634.

151. Ameer Khan (1869) 12 W. R. 35 ; Kalichurn (1871) 15 W. R. 17 : 6 B. L. R. App. 86.

152. Ifatulla (1931) 58 C. 1138 : 35 C. W. N. 456 : 32 Cr. L. J. 598 : A. I. R. 1931 C. 345 : 130 I. C. 884.

153. Chagan Rajaram (1912) 6 S. L. R. 116 : 13 Cr. L. J. 750 : 17 I. C. 62.

and the failure of the Judge to direct the Jury that the law is that every man must be presumed to intend the natural and ordinary consequences of his acts constitute very grave misdirection. All murder is culpable homicide, but all culpable homicide is not murder. Subject to the five exceptions of S. 300 I. P. C., every act that falls within one or more of the four clauses of that Section is murder and also falls within the definition of culpable homicide in S. 299 I. P. C. Every act that falls within one or more of the four clauses of S. 300 I. P. C., in respect of which there co-exist one or more of the sets of circumstances described in the five exceptions to that Section, is by that fact taken out of S. 300 I. P. C., but this act notwithstanding continues to be within S. 299 I. P. C., and since it is not murder it is culpable homicide not amounting to murder. Every act that falls within S. 299 I. P. C. and does not fall within S. 300 I. P. C., since it is not murder, is culpable homicide not amounting to murder. Where the accused had no legal excuse to go to a certain land in the possession of the party of the deceased, armed with dangerous weapons to enforce the right or supposed right and a fight ensued and the injuries inflicted, though not premeditated, resulted in the death of the deceased : *Held*, (per Sharfuddin & Teunon, JJ. ; D. Chatterjee, J. dissenting) that the case came within Cl. 4 of S. 300 of the Penal Code, and a charge of murder ought to have been framed against the accused.¹⁵⁴

It is not a correct proposition of law to lay down that a person who attempts to enforce a claim to property which he cannot substantiate, thereby creates the position that possession is with another ; and if in a direction to the Jury, the language used by the Judge is open to such a construction, the direction is not proper. In a trial under S. 304 I. P. C., the Judge directed the Jury that if the party of the accused were held to be in possession, none of them was guilty although there was a free fight between the parties ending with the death of some men of the complainant's party. *Held*, that the direction was bad, as it contained misdirection of fact and law, and that the conviction could not be sustained.¹⁵⁵

S. 304 A I. P. C.

Causing death by negligence.—

The prisoner, a fully developed adult man, was charged with causing the death of his wife aged 11 years and 3 months, who had not attained puberty, and was tried for offences under Ss. 304, 304 A, 325, and 338 I. P. C. *Held*, that in such a case when the girl is a wife and above the age of 10 years and when therefore the law of rape does not apply, it by no means follows that the law regards the wife as a thing made over to be the absolute property of her husband or as a person outside the protection of the Criminal law ; that under no system of law with which Courts have to do in this country, whether Hindu or Mahomedan or that framed under the British rule, has it ever been the law that a husband has the absolute right to enjoy the person of his wife without regard to the question of safety to her ;

154. Reaz-ud-din (1910) 11 Cr. L. J. 295 : 6 I. C. 251 (C).

155. Saheb Ali (1932) 34 Cr. L. J. 668 : A. I. R. 1933 C. 242 : 143 I. C. 899.

that no hard and fast rule can be laid down that sexual intercourse with a girl under a certain age must be regarded as dangerous and punishable, or over that as safe and right, but that each case must be judged according to its own individual circumstances ; that in such a case the Jury have to consider and say whether under the peculiar circumstances of the case, having regard to the physical condition of the girl and to the intention, the knowledge, the degree of rashness or negligence with which the accused is shown to have acted on the occasion in question, he has brought himself within any of the provisions of the Criminal law. *Held* further, that if the Jury were of opinion (a) that the act of the prisoner caused the death of the girl, that is to say that the act of cohabitation on the part of the prisoner had the effect of rupturing the vagina, and so causing the haemorrhage which led to her death ; (b) that the act of cohabitation between a fully developed man like the prisoner and an immature girl like his wife was in itself a thing likely to lead to dangerous consequences ; (c) that the act was of such a character as to indicate a reckless indifference to the welfare of the girl or a want of reasonable consideration about what the prisoner was doing, one which the husband of the girl, if he had a reasonable regard to her welfare and had exercised reasonable thought as to the act he contemplated doing, would have abstained from doing, they would be justified in finding that the prisoner caused the death of the girl by a rash and negligent act. ¹⁵⁶

The Judge charged the Jury with reference to S. 304A in the following terms : "If you do not think that the act amounted to culpable homicide but that the circumstances of this district in respect of the prevalence of disease of the spleen are such as to render any beating on the trunk of the body an act of criminal rashness, you will be justified in convicting the accused under S. 304A I. P. C. The High Court observed : "It appears that the Court has not put the matter before the Jury with sufficient precision. The mere circumstance of prevalence of the disease of spleen in the district in which the deceased resided is not sufficient to warrant a conviction under this Section. The Jury should have been further told that they must be satisfied that the accused was aware of the prevalence in the district of such disease and also aware of the risk of life involved in the striking on the trunk of the body of a person who might be suffering from disease of the spleen." ¹⁵⁷

A snake-charmer exhibited in public a venomous snake whose fangs he knew had not been extracted, and, to show his own skill and dexterity but without any intention to cause harm to any one, placed the snake on the head of one of the spectators. The spectator tried to push off the snake, was bitten, and died in consequence. Two persons (the snake-charmer and a companion of his) were put upon their trial on charges under Ss. 302, 304 and 304A I. P. C. The Jury were of opinion that exhibitions of this description by snake-charmers were warranted by custom ; that there was no intention on the part of the prisoners or either of them to kill the boy, and that his death was purely the result of an accident and accordingly acquitted the prisoner. The Sessions Judge, differing from the Jury, was of opinion that the case fell under S. 304A, as the accused persons, being by profession snake-charmers, were perfectly well aware of the deadly nature of the snake, and that it was therefore an act of the grossest negligence on their part to expose the boy and the spectators to the risk incurred

156. Hurree Mohan (1890) 18 C. 49.

157. Safatulla (1879) 4 C. 815.

by every one near when a poisonous snake was set at large. The High Court distinguished the case of *Queen v. Poonai Fattemah*¹⁵⁸ upon which the Judge had relied as that was a case in which the prisoner actually caused the snake to bite the person who was killed, and convicted the prisoners, one under S. 304 and the other under S. 304 read with S. 114 I. P. C., holding that the snake-charmer did the act with only the knowledge that it was likely to cause death.¹⁵⁹

S. 307 I. P. C.

Attempt to murder.—

The distinction between an offence under S. 307 I. P. C., and one under Ss. 299 and 300 I. P. C., read with S. 511 I. P. C., was pointed out in a case reserved under Cl. 24 of the Letters Patent of the Bombay High Court. That was a case tried by Westropp, J. and a Special Jury, and amongst the charges framed against the prisoner were those just mentioned. Couch, C. J. referring to the words of S. 307 I. P. C., observed : "It appears to me, looking at the terms of this Section as well as the illustrations to it, that it is necessary, in order to constitute an offence under it that there must be an act done under such circumstances that death might be caused if the act took effect. The act must be capable of causing death in the natural and ordinary course of things : and if the act complained of is not of that description, a prisoner cannot be convicted of an attempt to murder under this Section". Then, referring to the terms of S. 511 I. P. C., the learned Chief Justice observed : "The Jury have found that the prisoner presented the gun at the Drum Major with intent to murder him. There was, therefore, the intent and the belief of the prisoner that the gun was capable of effecting his purpose. And it appears to me that the presenting of the gun, under these circumstances, was an act of such an approximate nature as to bring the prisoner within the words of S. 511. The requirements of that Section are,—the intent, and an act done towards the commission of the offence. Supposing the gun was capped—loaded in the strict sense of the term—no one could for a moment doubt that presenting it at the Drum Major with the intention of murdering him would be an act done by the prisoner towards the commission of the offence, bringing him within the terms of S. 511."¹⁶⁰

S. 325 I. P. C.

Grievous Hurt.—

Where the hurt would be grievous only if it came within the eighth clause of the Section i. e., if it endangered life, and the Judge omitted to call the attention of the Jury to the

158. (1863) 12 W. R. 7.

160. Francis Cassidy (1867) 4 B. H. C. R. 17.

159. Gonesh Dooley (1879) 5 C. 351 : 4 C.L.R. 580.

medical evidence which was as follows: "My idea is that had there been no wounds inflicted on the deceased, there would not have been septic infection noticed by me. All the injuries, if received by any man in ordinary health, would, in my opinion, not be dangerous to his life." *Held*, that the omission was a misdirection.¹⁶¹ Where in a case under S. 325 I. P. C., the medical opinion was that the injuries of the deceased were not, in the case of a man of ordinary health, dangerous to life, *held*, that the Judge should have specifically called the attention of the Jury to such opinion.¹⁶²

S. 326 I. P. C.

Grievous hurt by dangerous weapon.—

Where there was evidence that certain persons conspired to eject the complainant from his land, or, in other words, to commit criminal trespass, and the Judge said that, if the Jury found that those persons conspired with the first accused to commit criminal trespass, then they would, if absent, be guilty of abetment, and being present they were guilty of the substantive offence: *Held*, that the omission to notice that the substantive offence for which the accused were being tried was not one of criminal trespass but voluntarily causing grievous hurt, constituted misdirection. *Held* also, that when the evidence against the co-accused was that they themselves came with the first accused and joined in beating the deceased, they could not be convicted of abetting the causing of grievous hurt by their presence because they would have been guilty of abetment had they been absent. If it be found that they all joined in the beating and the specific act which caused the grievous hurt was not brought home to any particular individual, they would be held liable under S. 34 I. P. C.; if they aided and abetted or abetted by intentionally aiding the first accused in beating the deceased, then they would be liable under S. 326 read with S. 109 I. P. C. The Jury have to give their verdict on the facts as against each man severally, and they are not, like the Judge, in charge of the entire case as a whole.¹⁶³

As regards the question whether a dangerous or deadly weapon is a question for the Jury or the Judge, see notes under S. 148 I. P. C., *ante*.

S. 333 I. P. C.

Causing grievous hurt to deter public servant from doing his duty.—

Where the trial Judge fails to explain the point of law to the Jury, viz, that where the accused was charged only under S. 333 I. P. C., and not under that Section read with S. 149

161. Panchu Doss (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

163. Jamiruddi (1912) 16 C. W. N. 909 : 13 Cr. L. J. 715 : 16 I. C. 523.

162. *Ibid*.

I. P. C., the conviction of those persons who are not proved to have caused any grievous hurt is not legally sustainable and the verdict of the Jury is liable to be set aside, in view of the misdirection by the Judge.¹⁶⁴

Ss. 361 and 362 I. P. C.

Kidnapping and Abduction.—

The accused was tried with two others on a charge of kidnapping a married girl under S. 366 read with S. 34 I. P. C. The Sessions Judge left it to the Jury to convict the accused of the offence of abduction under S. 366 I. P. C. *Held*, that notice of the charge of kidnapping is not a fair, proper or sufficient notice of the charge of abduction and the accused were prejudiced.¹⁶⁵ 'Forced' is S. 366 I. P. C., is used in its ordinary dictionary sense which would include forced by stress of circumstances (*R. v. Moon* (1910) 1 K. B. 505 explained). Even though a girl may have by the first act of seduction surrendered her chastity, subsequent seduction for further acts of illicit intercourse is also meant to be included in the term. If the girl is 16 or over she could only be abducted and not kidnapped, but if she is under 16 she could be kidnapped as well as abducted if the taking is by force or the taking or enticing is by deceitful means. A charge, setting out the offences of kidnapping and abduction in the alternative, is not bad in law.¹⁶⁶ If the prosecution be in doubt whether the offence disclosed was one of abduction or of kidnapping, charges may be framed on both and the verdict of the Jury may be taken on both.¹⁶⁷ An explanation to the Jury that a child playing about a public road is still under the lawful guardian of its parent or relative living close by, as the case may be, is not a misdirection.¹⁶⁸ The Judge said in his charge to the Jury: "Now, the lawful guardian of a married woman is no doubt her husband. But there is evidence before you that she came with the consent of the husband into the house of her father, if you believe such evidence. Therefore the father of the girl was her de facto lawful guardian for the time that the girl was residing in her father's house." *Held*, that in matters of this kind a Judge should adhere to the words of the particular Section of the Penal Code with which he has to deal, and not substitute phraseology of his own, and what should have been left to the Jury was whether or not the father had been lawfully entrusted with the care and custody of the girl, instead of the form adopted by the Judge. *Held*, also that as the Judge failed to place before the Jury a fair and proper statement of the evidence that the

164. Lal Behari (1934) 11 O. W. N. 831 : 35 Cr. L. J. 1066 : A. I. R. 1934 O. 354 : 150 I. C. 509.

165. Isu Sheikh (1926) 31 C. W. N. 171 : 45 C. L. J. 584 : 28 Cr. L. J. 201 : A. I. R. 1927 C. 200 : 99 I. C. 937 ; Fedu Sheikh (1928) 32 C. W. N. 1245 : 30 Cr. L. J. 857 : 117 I. C. 862.

166. Profulla Kumar (1929) 57 C. 1074 : 50 C. L. J. 593 : 31 Cr. L. J. 903 : A. I. R. 1930 C. 209 : 125 I. C. 656.

167. Muhammad Ali (1932) 34 Cr. L. J. 1107 : A. I. R. 1933 C. 194 : 145 I. C. 925. *See also* Mafizaddi (1927) 31 C. W. N. 940 : 45 C. L. J. 561 : 28 Cr. L. J. 805 : A. I. R. 1927 C. 644 : 104 I. C. 245.

168. Musst. Oozeerun (1867) 7 W. R. 62.

girl came with the consent of her husband to the house of her father, his charge in this respect amounted to a misdirection.¹⁶⁹

In a trial held with a Jury by Cunningham, J. the learned Judge reserved the question whether one Mrs. L could be said to be the legal guardian of the child within the meaning of S. 361 I. P. C. It was held,—“We think * * that the object of that and the cognate Sections of the Code is at least as much to protect children of tender age from being abducted or seduced for improper purposes as for the protection of the rights of parents and guardians ; and we also think that the somewhat liberal explanation of the words “lawful guardian” under S. 361 is intended to obviate the difficulty, which would otherwise arise if the prosecution were required to prove strictly in cases of this kind that the person from whose care or custody a minor had been abducted or kidnapped came strictly within the meaning of a guardian according to the legal acceptance of that word. We cannot doubt for a moment that the mother of an illegitimate child is its proper and natural guardian during the period of nurture ; and if, during that period the mother dies and commits the child * * to the care of a faithful friend, who accepts the trust and maintains the child in her own house and at her own expense, we think it clear that such a person is “lawfully entrusted” with the care and custody of the minor within the meaning of the Explanation in Section 361.”¹⁷⁰

S. 366 I. P. C.

Kidnapping or abducting a woman to compel marriage, etc.—

The ‘will’ referred to in the first part of S. 366 I. P. C., means the will of the girl and not the will of her guardian. Where the Judge said,—“The girl being a minor can have no will of her own in law and that in law her will was presumed to be the same as her guardian’s will”: *Held*, that there was a misdirection to the Jury vitiating the trial.¹⁷¹ In a trial under S. 366 I. P. C., the direction to the Jury that the fact of previous intimacy of the accused with the girl is wholly immaterial, is misdirection.¹⁷² The reasons for holding that it is so has been given in words to this effect :—The expression ‘seduced to illicit intercourse’ in S. 366 I. P. C., is not restricted in meaning to inducing a girl to surrender her chastity for the first time : the expression means ‘induced to surrender or abandon a condition of purity from unlawful sexual intercourse.’ Therefore, an accused cannot be convicted of this offence unless it is proved that the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past and thereafter have resumed a life of purity.

169. Nakul (1909) 13 C. W. N. 754 : 11 Cr. L. J. 9 : 41 C. 543.

170. Peamantle (1882) 8 C. 971.

171. Fulchand (1931) 36 C. W. N. 49 : 33

Cr. L. J. 512 : A. I. R. 1932 C 442 : 137 I. C. 819.

172. Shahebbali (1931) 60 C. 1457 : 33 C. W. N. 71 : 35 Cr. L. J. 307 : A. I. R. 1933 C. 718 : 147 I. C. 79.

On the other hand, if she is already leading a life of indulgence in unlawful sexual intercourse at the time of the kidnapping it cannot be said with any reason or sense that she was kidnapped "in order that she might be seduced to illicit intercourse" within the meaning of the Section. In such a case the accused could not have kidnapped her in order that she might be led astray in conduct, or drawn away from the right course of action into a wrong one, because she was already astray and was pursuing a wrong course at the time of the kidnapping. Consequently, where in a trial for an offence under S. 366 I. P. C., the Judge tells the Jury that the fact of previous intimacy with the girl is immaterial, it is misdirection. Where illicit intercourse had been going on between the girl and the accused before she left home and probably had been going on for sometime before the kidnapping, it cannot be said that the accused kidnapped her in order that she might be seduced to illicit intercourse and he cannot be convicted under S. 366. The expression 'seduced to illicit intercourse' is not to be intended to be restricted to an inducement to a woman to surrender her chastity for the first time, but it cannot be deemed to include a case where a man takes back a woman with whom he had been living until recently for a period of several months during which he had been indulging in sexual intercourse.¹⁷³

The Judge, on the question of intent, charged the Jury as follows: "It remains only to consider the question of intent. The charge was that the girl was kidnapped in order that she might be forced or seduced to illicit intercourse. As to this, it is sufficient to say that no other inference is possible under the circumstances. When a man carries off a young girl at night from her father's house, the presumption is that he did so with the intent indicated above. It would be open to him, if he had admitted the kidnapping, to prove that he had some other object, but no other object is apparent on the face of the facts." *Held*, that this amounted to a misdirection of the Jury; the question of intent was a pure question of fact; but the way in which it had been put to the Jury left them no option but to adopt the view taken by the Judge. The Judge might have left for the Jury to find that if the intent was not proved as required by S. 366 I. P. C., nevertheless the simple offence of kidnapping was proved and they might convict the accused of the lesser offence under S. 361 I. P. C.¹⁷⁴

Where it appeared that the Jury were likely to be misled into believing that what they had to find was not that the woman was abducted for illicit intercourse, but that she was abducted for the purpose of bringing pressure to bear on her husband to withdraw a certain case against the accused and they brought in a verdict of guilty on this understanding, the conviction under S. 366 I. P. C., ought not to stand.¹⁷⁵

The rule that it is extremely dangerous and so admissible only in exceptional cases to convict a man of a sexual offence on the uncorroborated testimony of the complainant must be

173. Krishna Maharana (1929) 9 P. 647: 31 Cr. L. J. 306; A. I. R. 1929 P. 651: 121 I. C. 477; Jangly Mian (1933) 35 Cr. L. J. 814; A. I. R. 1934 P. 170: 148 I. C. 791.

174. Hughes (1891) 14 A. 25: 11 A. W. N. 170.

175. Narain (1935) 1935 A. L. J. 670: 36 Cr. L. J. 826; A. I. R. 1935 A. 665: 155 I. C. 662.

properly emphasized in the charge to the Jury. The Judge should point out to the Jury that they are entitled, if they please, to convict the accused on the uncorroborated testimony of the girl, but that it is dangerous to do so in cases dealing with sexual offences such as rape, abduction and similar cases, and that only in exceptional cases should they convict upon the uncorroborated testimony of the girl. Failure to do so amounts to a non-direction which vitiates the trial. Similarly, where the Judge does not direct the Jury as to whether there was evidence, corroborating her statement, of the kind required by law, that is to say, evidence independent of her own statements, the trial is vitiated.¹⁷⁶

In a case under S. 366 I. P. C., it was suggested on behalf of the prosecution that up to the time of lodging information at the Police Station, the father of the girl alleged to have been kidnapped did not suspect that his daughter had been taken away for the purpose of being forced to illicit intercourse, since she had already been working as a maid-servant in the accused's house and the father did not suspect foul play. The Assistant Sessions Judge told the Jury to consider this explanation in arriving at their conclusion : *Held*, that there was no misdirection in his statement to the Jury.¹⁷⁷

Ss. 366 & 498 I. P. C.

Kidnapping or abducting a woman to compel marriage etc, and enticing or taking away or detaining a married woman with criminal intent.—

Where the accused were charged under S. 147 I. P. C., with the common object of abducting the complainant's wife with the intent that she would be compelled or knowing it likely that she would be compelled to marry some one against her will, and they were also charged under S. 366 I. P. C., with the same object and under S. 498 I. P. C., and the Judge directed the Jury that, if they found that she was abducted by dragging her by the hand or the hair then such abduction would amount to offences under Ss. 341 and 352 I. P. C., and the accused was convicted of rioting under S. 147 I. P. C., and acquitted of the offences under Ss. 366 and 398 I. P. C. : *Held*, that there was no misdirection and that the conviction under S. 147 I. P. C., with the common object of abduction under circumstances constituting the offences under Ss. 341 and 352 I. P. C., was legal, as the latter offences were minor offences within S. 238 Cr. P. C., involved in the charge of rioting as actually framed.¹⁷⁸ Where a case was committed to the Sessions Court under Ss. 366, 420 and 120B I. P. C., but though there was no complaint by any person competent under S. 199 Cr. P. C., to make one the Judge added a charge under S. 498 I. P. C., and left it to the Jury to decide whether it was

176. Chamuddin (1935) 37 Cr. L. J. 359 : A. I. R. 1936 C. 18 : 160 I. C. 1028 [applying Nur Ahmed (1933) 62 C. 527 : 38 C. W. N. 108 : 36 Cr. L. J. 796 : A. I. R. 1934 C. 7 : 155 I. C. 584,

177. Hari Mahto (1935) 37 Cr. L. J. 320 : A. I. R. 1936 P. 46 : 160 I. C. 675.

178. Torap Ali (1926) 53 C. 599 : 44 C. L. J. 239 : 27 Cr. L. J. 1314 : A. I. R. 1926 C. 1059 : 98 I. C. 386,

a proper charge or not, it was held that it was the Judge's plain duty to decide that question himself and there was no reason whatsoever why he should have treated it as a question of fact and left it for the Jury to deal with.¹⁷⁹

S. 366A I. P. C.

Procurement of a minor girl.—

In an offence under S. 366A I. P. C., the Judge must put the question of the girl's age before the Jury, and where he omits to do so he misdirects himself.¹⁸⁰ The Judge, in his charge to the Jury, told them that he did not agree that under S. 366A it was necessary to show that the illicit intercourse was to be with some other person besides the accused. *Held*, that this was a misdirection under the law as it now stands, namely the person who induces a girl of an age between the years 16 and 18 without force or fraud to go from any place with the intention that she will have illicit intercourse with himself does not commit any offence. The new Section 366A I. P. C., however, makes it an offence in the case of such girl if she is induced by a person to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with *another* person.¹⁸¹

S. 368 I. P. C.

Concealing or keeping in confinement a kidnapped or abducted person.—

The proper way to charge a Jury in a case under S. 368 I. P. C., is to place before the Jury the direct evidence of knowledge of the accused as to the abduction, to point out the strength and weakness of that evidence and to tell the Jury that this is the only evidence relating to the knowledge; and then to place before them the circumstances, if any, which might raise an inference of knowledge of the abduction on the part of the accused and lastly to ask the Jury to draw their own conclusion. A charge which places before the Jury the direct evidence as to the knowledge of the accused, the evidence of suspicion having been aroused in the mind of the accused and the evidence which shows that suspicion should have arisen in his mind, without making any distinction, is defective on a crucial point and is likely to vitiate the verdict.¹⁸² Where in a prosecution under S. 368 I. P. C., the Judge did not adequately bring out in his charge to the Jury the difference between knowledge and the

179. Ramjanam (1935) 14 P. 717 : 36 Cr. L. J. 856 : A. I. R. 1835 P. 357 : 155 I. C. 866.
See also Chemon Garo (1902) 29 C. 415 : 6 C. W. N. 677 ; Kallu (1882) 5 A. 233 : 3 A. W. N. 1.

180. Nehru Mal (1927) 2 Luck 597 : 28 Cr. L. J. 683 : A. I. R. 1927 O. 259 : 103 I. C. 411.

181. Abbas Behara (1932) 37 C. W. N. 317 : 34 Cr. L. J. 341 : A. I. R. 1933 C. 362 : 142 I. C. 308.

182. Gadadhar (1924) 26 Cr. L. J. 1021 : A. I. R. 1926C. 226 : 87 I. C. 845.

existence of the grounds for belief or suspicion : *Held*, that the verdict of the Jury was vitiated by misdirection.¹⁸³ In a trial of two persons K and S under Ss. 368 and 368/109 I.P.C., the Judge failed to direct the Jury upon the contradictory statements of the girl seduced, made before the Police and at the trial which were so important to the accused, nor did he make any attempt to deal with their cases separately, beyond a general direction, and he misdirected the Jury by telling them that by merely delivering the girl to K, S abetted him, without pointing out to them that it was necessary to be satisfied that S had a guilty mind : *Held*, that the convictions and sentences imposed upon S and K must be set aside.¹⁸⁴ On a charge under S. 368 I. P. C., it should be pointed out to the Jury that the Section refers to some other party who assists in concealing any person who had been kidnapped and does not refer to the kidnappers.¹⁸⁵

S. 373 I. P. C.

Buying a minor for purposes of prostitution.—

In a prosecution for an offence under S. 373 I. P. C., the Judge told the Jury that they might appeal to their own experience and apply that experience to the impression that they had formed on seeing the girl for 3 days. The Judge, however, omitted to say that such an impression would never be a sure guide. *Held*, that there was a material misdirection vitiating the trial.¹⁸⁶ Where a Judge told the Jury that to bring a case within S. 373 I. P. C., it is not necessary that possession must be obtained from a third party ; *held*, that the direction was right. A person, who steals a minor girl under 18 years of age with the requisite intention, obtains possession of such minor within the Section. It is often said that a man enjoying sexual intercourse with a woman possesses her, but possession within S. 373 means something more. It denotes definite control over the person of whom possession is obtained. Possession in S. 373 indicates possession with a power of disposal.¹⁸⁷

S. 375 I. P. C.

Rape.—

Sexual intercourse by a man with a woman without her full consent, i.e., consent obtained without putting her in fear of injury, amounts to rape ; and the Judge should leave

183. Zamin (1931) 8 O.W.N. 1325 : 33 Cr L. J. 275 : A. I. R. 1932 O. 28 : 136 I. C. 243.

184. Shaheba (1933) 60 C. 1457 : 38 C. W. N. 71 : 35 Cr. L. J. 307 : A. I. R. 1933 C. 718 : 147 I. C. 79.

185. Sheik Oozeer (1866) 6 W. R. 17.

186. Bholn Sardar (1930) 35 C.W.N. 316 : 33 Cr. L.J. 553 : A.I.R. 1932 C. 417 : 138 I.C. III.

187. Bhagchand (1934) 58 B. 498 : 35 Cr. L. J. 1437 : A. I. R. 1934 B. 200 : 151 I. C. 877 [relying on Dowlath Bee v. Shaikh Ali (1870) 5. M. H. C. R. 73 (F.B.) : 1 Weir 377 ; and following Shamsundarbai [(1920) 45. B. 529 : 22 Cr L. J. 29 : 59 I. C. 141].

the question to the Jury, and not direct them to find that the woman's consent after a considerable struggle renders the charge of rape nugatory.¹⁸⁸ In a case of rape, even though the accused denies the whole story, it is the duty of the Judge to tell the Jury that the burden was on the prosecution to prove, in addition to the factum of sexual intercourse, that the girl was below 14 or else that the accused committed the act against her will or without her consent.¹⁸⁹ The question whether the sexual intercourse was against the girl's will and consent should be left to the Jury.¹⁹⁰ It is only when consent is the defence pleaded that the question would arise as to whether the girl was of age to give consent, and where there is such a plea the Judge should bring to the notice of the Jury the question of the girl's age.¹⁹¹ In a case of rape where the question of consent arose and scratches and bruises appeared on the woman, the High Court observed,—“It should have been pointed out that the scratches and bruises on the woman's legs and arms which may have impressed the Jury were not inconsistent with voluntary intercourse under unfavourable conditions.¹⁹² On the trial of a sexual offence the woman's evidence need not necessarily in law be corroborated¹⁹³; but in practice it is usually required.¹⁹⁴ Where consent is a defence to the charge of rape the Jury must be warned of the absence of corroboration.¹⁹⁵ In such cases the evidence of complaint made by the prosecutrix is not properly called corroboration; the true rule for direction in them is laid down in *Lillyman's* case (noted *infra*).¹⁹⁶ On a charge of indecent assault where the prosecutor's evidence is very weakly corroborated, the desirability of effective corroboration must be put to the Jury.¹⁹⁷ Upon a trial for an indictment of rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence and the particulars of such complaint may, so far as they relate to the charge against the prisoner, be given on the part of the prosecution, not being evidence of the facts complained of but as evidence of consistency of the conduct of the prosecutrix with the story told by her in the witness-box and negating consent on her part.¹⁹⁸ The correct direction on a charge of indecent assault is that it is not safe to convict on the uncorroborated evidence of the prosecutrix but that the Jury may, if satisfied of her veracity, after paying attention to the warning, nevertheless convict.¹⁹⁹ On a charge of indecent assault, when consent is a good defence, it is a grave misdirection to cause the Jury to believe that because the defence has not set up consent, they may convict, though, in fact, they think there was consent.²⁰⁰ Five Judges enunciated the following principle :—“The Court is of opinion that if the facts of a case proved in evidence are such that the Jury might reasonably infer consent,

188. Akbar Kazee (1864) 1 W. R. 28.

189. Abdul Khaleque (1933) 37 C. W. N. 484 : 34 Cr. L. J. 1161 : A. I. R. 1933 C. 606 : 145 I. C. 923.

190. Ali Fakir (1897) 25 C. 230.

191. Samuel John (1935) 1935 A. L. J. 1079 : 37 Cr. L. J. 247 : A. I. R. 1935 A. 935 : 160 I. C. 163.

192. Ismail Sarkar (1918) 23 C. W. N. 747 : 19 Cr. L. J. 830 : 46 I. C. 846.

193. Crocker (1922) 17 Cr. A. R. 45.

194. Barry (1924) 18 Cr. A. R. 65 Brown (1911) 6 Cr. A. R. 24.

195. Solomon (1924) 17 Cr. A. R. 50.

196. Lovell (1923) 17 Cr. A. R. 163.

197. Killick (1924) 17 Cr. A. R. 120.

198. Lillyman (1896) 2 Q. B. 167 ; Coulthred (1933) 23 Cr. A. R. 44.

199. Jones (1925) 19 Cr. A. R. 40 ; White-head (1929) 21 Cr. A. R. 23.

200. Horn (1912) 7 Cr. A. R. 200.

there might to be a direction to the Jury by the Judge on that question. It is easy to point out where the onus of proof lies and what is the evidence on that point in any particular case. But if the facts proved in evidence are not such that the Jury might reasonably infer consent, and particularly if the case has been conducted by Counsel in such a way as to make the question of consent immaterial or entirely secondary to the main defence, there is no necessity for such a direction. It is impossible to lay down a rule applicable to all cases, but this indication of the principles on which the Judge should act will, we think, be sufficient as a general rule."²⁰¹

The Judge should warn the Jury that in cases arising out of sexual matters, when the charges are made against a man by a woman it is dangerous to convict upon her evidence alone and that they ought to require corroboration of her story before they bring in a verdict of guilty. The kind of corroboration required by the rule must be independent evidence, that is to say the evidence of some witness other than the girl herself. He should make the Jury understand that only in exceptional cases they would be justified in accepting her uncorroborated testimony.²⁰² In a case of rape, the Judge must, as a matter of practice, warn the Jury not to accept the evidence of the girl alleged to have been raped unless they find that it is corroborated in some material particulars implicating the accused. But he ought to tell them that if, inspite of the warning, they come to the conclusion that they believe the girl and think the accused guilty, then they have the right to convict him on her uncorroborated evidence. Evidence affecting the character of the prosecutrix should certainly be mentioned; and before a Jury are justified in accepting her testimony the Jury must be satisfied that she is a witness of truth, and if they find that she is a person of bad or loose character, obviously they would be reluctant to accept her evidence. Where the Judge has failed to direct the Jury on these material points the conviction must be set aside.²⁰³ Where in a case of double rape in broad daylight it appeared that the complainant's husband and brother-in-law were only seventy yards away when this took place and she shouted to them for help. *Held*, that this was an important fact from the defence point of view which should have been brought to the notice of the Jury and that the omission of the Judge to do so constituted misdirection and warranted interference with the verdict.²⁰⁴

There is a distinction between vulval penetration and vaginal penetration. It is not necessary that the hymen should be ruptured in every case. In order to constitute rape the statute merely requires medical evidence of penetration and this may occur while the hymen remains intact.²⁰⁵

201. May (1912) 7 Cr. A. R. 63.

202. Nur Ahmed (1933) 62 C. 527 : 38 C. W. N. 108 : 36 Cr. L. J. 796 : A. I. R. 1934 C. 7 : 155 I. C. 584.

203. Surendra (1933) 38 C. W. N. 52 : 35 Cr. L. J. 508 : A. I. R. 1933 C. 833 : 147 I. C. 999 [referring to *R. v. Thomas James Jones* (1925)

19 Cr. App. Rep. 40 ; *R. v. Baskerville* (1916) 2 K. B. 658 : 80 J. P. 446.]

204. Abdul Aziz (1934) 30 N. L. R. 262 : 35 Cr. L. J. 957 : A. I. R. 1934 Nag. 94 : 149 I. C. 447.

205. *Musst. Jantan* (1934) 36 Cr. L. J. 310 : A. I. R. 1934 L. 797 : 153 I. C. 218

Ss. 375 and 497 I. P. C.**Rape and adultery.—**

Where an accused was committed to the Sessions to stand his trial under S. 376 I. P. C. the Judge added a charge under S. 497 I. P. C., and the accused was acquitted of rape and convicted of adultery in accordance with the verdict of the Jury. *Held*, that the Judge had acted without jurisdiction and the fact that the husband appeared as a witness in the prosecution of the offence of rape cannot be regarded as amounting to the institution of a charge of adultery.²⁰⁶

Ss. 375 and 511 I. P. C.**Attempt at rape.—**

In *Reg v. Lloyd*²⁰⁷ Patterson, J. in summing up said: "In order to find the prisoner guilty of an assault with intent to commit rape, you must be satisfied that the prisoner, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do it at all events, and notwithstanding any resistance on her part". This was quoted in *Emp v. Sankar*²⁰⁸ and it was said,—“We believe that in this country indecent assaults are often magnified into attempts at rape, and even more often into rape itself; and we think that a conviction of an attempt at rape ought not to be arrived at, unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance.”

S. 377 I. P. C.**Unnatural offences.—**

This crime is complete if the Jury is satisfied that penetration took place.²⁰⁹ In *R v. Jellyman*,²¹⁰ the prisoner was tried for having committed an unnatural offence with his own wife. Patterson, J. who tried the case said: “There was a case of this kind which I had the misfortune to try and it there appeared that the wife consented. If that had been so here the prisoner must have been acquitted; for although consent or nonconsent is not material to the offence yet, as the wife, if she consented, would be an accomplice, she would require confirmation, and so it would be with a party consenting to an offence of this kind, whether man or woman”.

206. Chemon Garo (1902) 29 C. 415 : 6 C. W. N. 677. *See also* Kallu (1832) 5 A. 233 : 3 A. W. N. I. ; Ramjanam (1935) 14 P. 717 : 36 Cr. L. J. 856 : A. I. R. 1935 P. 357 : 155 I. C. 866.

207. (1836) 7 C. & P. 318.

208. (1881) 5 B. 403.

209. Reekspear (1832) 1 Mood. C. C. 342 ; Cozens 6 C. & P. 351.

210. (1838) 8 C. & P. 604.

S. 379 I. P. C.

Theft.—

The Judge is bound to explain the offence of theft to the Jury, and to draw their attention to the fact that the removal of the property must be done dishonestly within the meaning of the term in the Penal Code.²¹¹ In larceny under the English law the prosecution must prove intent.²¹² Where a Sessions Judge, without explaining to the Jury what was meant by theft, asked them to decide whether the accused were found in the place of theft and whether they were there with an honest or dishonest intention; *held*, that the verdict must be set aside as the Jury were not asked to find on the question of dishonest removal.²¹³ But where there was no question raised by the accused as to the legal possession of the article stolen, or the absence of any dishonest intention on his part, and the trial Judge in his charge to the Jury omitted to explain the nature and elements of the offence beyond stating that the offence was completed as soon as the article intended to be stolen is removed by the thief with that object; it was *held* that there was no misdirection.²¹⁴ It is not a correct proposition of law to lay down that a person who attempts to enforce a claim to property which he cannot substantiate, thereby creates the position that possession is with another; and if the language of a charge is open to that construction it is bad for misdirection.²¹⁵ Where in explaining S. 114 ill (a) of the Evidence Act, the Judge charged the Jury that "when it is proved or it may be reasonably presumed that the property in question is stolen property, the burden of proof is shifted and the possessor is bound to show that he came by it honestly; and if he fails to do so the presumption is that he is a thief or receiver according to circumstances; and if the Jury find that the accused have failed to account for their possession, then they may presume that they have come dishonestly by the stolen property": *Held*, that before the presumption under the Section may arise it must be proved that the property found in the possession of the accused was stolen, and that the Judge had misdirected the Jury in stating that it also arose when it might be reasonably presumed that the property was stolen.²¹⁶ A presumption under S. 114 may be made, but it is a matter for the Jury if they will make it or not.²¹⁷ The question of recent possession of a stolen article depends not only on lapse of time but upon the nature of the property and the concomitant circumstances of each particular case. The accused person was found to be in possession of the goods after a lapse of 14 months from the date of the dacoity. The Judge in his charge to the Jury left the question to the Jury to decide whether possession was recent so as to raise a presumption that they were stolen property. *Held*, that there was a misdirection to the Jury and the Judge should have held that there was no evidence of recent possession.²¹⁸ In a charge under S. 379 and S. 411

211. *In re Venkatigadu* (1926) 27 Cr. L. J. 1191 : A. I. R. 1926 M. 1121 : 97 I. C. 951.

212. *Sturgess* (1913) 9 Cr. A. R. 121.

213. *In re Kamma* (1909) 11 Cr. L. J. 164 : 4 I. C. 1071 (M.).

214. *Rangare Ramudu* (1922) A. I. R. 1923 M. 329.

215. *Saheb Ali* (1932) 34 Cr. L. J. 668 : A. I. R. 1933 C. 242 : 143 I. C. 899.

216. *Satya Charan* (1924) 52 C. 223 : 26 Cr. L. J. 1155 : A. I. R. 1925 C. 666 : 88 I. C. 515.

217. *Arumuga* (1933) 1933 M. W. N. 320.

218. *In re Muthu V. era* (1928) 1929 M. W. N. 517 : 30 Cr. L. J. 542 : 115 I. C. 831.

I. P. C., alternatively, the Judge should tell the Jury that it is open to them to find the accused guilty of theft or only of receiving stolen property, having regard to the presumption contained in S. 114 of the Evidence Act.²¹⁹

It is not the law that if the prosecution succeeds in proving possession of recently stolen goods it is the duty of the accused to prove his innocence and that the presumption raised of his guilt cannot be rebutted by mere denial; such a statement of the law laid down by a Judge in his charge to the Jury amounts to a misdirection and vitiates the charge.²²⁰

In a case of theft the Judge in his charge to the Jury said;—"The law is that when a person is found in possession of stolen property very soon after the theft he may be presumed to be the thief 'if there is no evidence to the contrary' " instead of saying 'unless he can account for his possession'; but there were passages in the charge which showed that the Judge did not mean and the Jury did not understand him to mean that they should pay no attention to the explanation which the accused might put forward, in the absence of evidence to support it. *Held*, that the passage did not amount to a misdirection.²²¹

S. 380 I. P. C.

Theft in a building.—

The accused, who was charged by his master with having committed theft of a box, stated that he had removed the box, and left it concealed in the cowshed to give a lesson to his master. The Sessions Judge in his charge to the Jury said: "If the Jury find that the accused removed the box to put the owner to trouble, that is causing wrongful loss to the owner, and the act is theft;" and the Jury returned a verdict of guilty, finding "that the taking was with the intention of putting the owner to trouble", *Held*, that the above charge and verdict were based on an erroneous view of the law. It cannot be said that removing a thing to put the owner to trouble is necessarily and in every case causing "wrongful loss", as for instance where the owner is kept out of possession temporarily, only with the object of causing him trouble in the sense of mere mental anxiety, and with the ultimate intention of restoring the thing to him without exacting or expecting any recompense, it is difficult to say that the detention amounts to causing wrongful loss in any sense.²²²

S. 392 I. P. C.

Robbery.—

It is not to be assumed that every juryman knows the distinction between theft and robbery, and the omission by the Judge to explain to the Jury the essential elements of the offence of robbery is not cured by the fact that evidence was given in the case which, if believed by the Jury, would warrant the conviction of the accused on a charge of dacoity.²²³

219. Ganga (1931) 1934 M. W. N. 374.

220. Kibatulla (1925) 53 C. 157 : 42 C. L. J. 212 :
26 Cr. L. J. 1582 : A. I. R. 1925 C. 1241 :
90 I. C. 542.

221. In re Chinnu (1915) 16 Cr. L. J. 619 : 30 I. C.
442 (M.).

222. Nabi Baksh (1897) 25 C. 416 : 2 C. W. N.
347.

223. Mari Valayan (1906) 30 M. 44 : 5 Cr. L. J.
78 ; Nawab Ali (1924) 11 O. L. J. 315 :
25 Cr. L. J. 1129 : A. I. R. 1924 O. 411 :
81 I. C. 953.

Where the evidence was that shortly after the murder the murdered girl's jewellery was discovered in the possession of the accused, and the Judge told the Jury that if it had been removed from her after her death, the offence would come under S. 404 I. P. C. : *Held*, that that was not a proper direction, as the question for consideration was whether the murder had been committed for the purpose of stealing, and if so the offence would come under S. 392 I. P. C.²²⁴ A charge to the Jury is defective if the Judge leaves it open in the mind of the Jury that they were entitled to convict the accused persons of robbery, if merely in the course of committing theft some violence or wrongful restraint was caused to others, without emphasizing the point that such violence should have been caused not merely in the course of but also for the purpose of and with a view to the theft.²²⁵

S. 395 I. P. C.

Dacoity.—

It is not sufficient for the Judge merely to read to the Jury the definition of dacoity, and to leave it to them to find out whether the evidence produced for the prosecution made out a case under S. 395 I. P. C., against the accused. It is the duty of the Judge to call the attention of the Jury to the different elements constituting the offence, and to deal with the evidence by which it is proposed to make the accused liable under the Section. His failure to do so amounts to misdirection.²²⁶ In a case of dacoity, if the Judge does not explain the essential ingredients of robbery it is not a technical but a real defect.²²⁷ Where the accused were charged with a number of offences which are of a complex character, viz, Ss. 395, 380/149, 147 and 143 I. P. C., it was very necessary that the Judge should have explained to the Jury what the elements are which go to constitute each of those offences, and should have clearly placed before them the distinction between them. Where the Judge failed to do so, it amounted to a misdirection vitiating the verdict within the meaning of S. 423 (d) Cr. P. C.²²⁸ Where in a charge to the Jury, the Sessions Judge merely stated as follows : "The nature of the charge is no doubt familiar to you all. It must be proved that there was robbery committed by five people or more and that each of the accused took part in that robbery." And he omitted to explain to the Jury what was necessary to constitute the offence of robbery and what distinguished robbery from theft." It was held that there was a misdirection and the trial was vitiated, and that failure to comply with the requirements of S. 297 Cr. P. C., cannot be considered to be a mere irregularity curable by S. 537 Cr. P. C.²²⁹ But where in case under S. 395 I. P. C., though the Judge did not give a full explanation of

224. In re Muniyan (1926) 27 Cr. L. J. 1368 : A. I. R. 1927 M. 243 : 98 I. C. 488.

225. Duraiswami (1930) 1930 M. W. N. 1142 : 32 Cr. L. J. 973 : A. I. R. 1931 M. 481 : 133 I. C. 7.

226. Taju Pramanik (1898) 25 C 711 : 2 C. W. N. 369 ; Sugalgadu (1898) 2 Weir 500.

227. Jagan (1934) 11 O. W. N. 200 : 35 Cr. L. J. 507 : A. I. R. 1935 O. 175 : 147 I. C. 976.

228. Biru Mandal (1897) 25 C. 561.

229. Nawab Ali (1924) 11 O L J. 315 : 25 Cr. L. J. 1129 : A. I. R. 1924 O. 411 : 81 I. C. 953 ; Mari Valayan (1906) 30 M. 44 : 5 Cr. L. J. 78.

the provisions of law under which the charge had been framed, yet he had put before the Jury every fact necessary to establish the offence charged, and though the Judge did not definitely explain that the Jury must give a distinct verdict as to each of the three accused, he had nevertheless dealt with the case of each accused separately; *held*, that there was no misdirection.²³⁰ One P along with others were being tried on a charge of dacoity for forcibly abducting two bullocks. P claimed the bullocks to belong to him. The Judge in his charge to the Jury told them that they must find the prisoners guilty of dacoity, because the evidence showed that five persons together conjointly committed robbery with the intention of causing wrongful gain to P. It is quite possible that some of the prisoners may have fairly believed that the two bullocks carried off really belonged to P. Therefore, in not putting this point of the knowledge and intention on the part of the prisoners forcibly to the Jury for their consideration, and in telling them that if they believed the evidence they must convict the prisoners of dacoity, the Judge misdirected the Jury. In a case of dacoity, the Judge should direct the Jury to convict only if they find *all* the prisoners had the intention of causing wrongful loss to the prosecutor.²³¹ Again, it is essential that the Jury should be directed that theft becomes robbery only when it is shown that in the course of committing theft and for the purpose of committing the violence is used. The omission to mention this essential point amounts to misdirection which vitiates the trial.²³² The attention of the Jury should be called to the number of persons who are said to have taken part so that the element as to number may be present in their minds.²³³ Where the Judge has adequately explained in his charge what is necessary to constitute the offence of dacoity he has done all that can reasonably be expected of him; so when the Jury brings in a verdict of guilty on a charge under S. 395 I. P. C., in respect of less than five persons it cannot be said that there is a duty upon the Court to satisfy itself that in coming to such a verdict there has been present in the minds of the Jury the necessity of at least five persons concerned in the offence.²³⁴ The Madras High Court has taken a different view. What it says is this:—"Where the Jury have before them a charge of dacoity, viz, in cases where the charge is against named persons, the Jury often return a verdict acquitting some of them and convicting others and the number of those convicted falls below five. In such cases it should be pointed out to the Jury what the effect of that verdict is. Thus, the number of the convicted persons being less than five, unless the Jury are of opinion that in addition to the acquitted persons, there were other persons concerned, not before the Court, the verdict of conviction of less than five persons of the offence cannot stand. Therefore the Jury must be told that they must have due regard to the fact that they have acquitted a certain number of persons reducing the number to below five and that they must be satisfied before convicting any number short of five that they were

230. Jindar Singh (1924) 1 O. W. N. 332 : 25 Cr. L.J. 1032 : A. I. R. 1925 O. 69 : 81 I. C. 808.

231. Bonomally (1864) W. R. (January to July 1864) 8.

232. In re Raman (1937) 54 M. 5 8 : 32 Cr. L. J. 1212 : A. I. R. 1931 M. 427 : 134 I. C. 801.

233. Pidda Enumunduguru (1910) 1 M. W. N. 52 : 11 Cr. L. J. 249 : 5 I. C. 797.

234. Gislam Asphia (1932) 33 Cr. L. J. 477 : A. I. R. 1932 C. 295 : 137 I. C. 497 [not following In re Raman (1930) 54 M. 588 : 32 Cr. L. J. 1212 : A. I. R. 1931 M. 427 : 134 I. C. 801].

acting conjointly with persons not charged in the case."²³⁶ Where a Judge told the Jury that dacoity is robbery committed by more than five persons, instead of saying that it was robbery committed by five persons or more, *held*, that it was a misdirection, but it was a misdirection in favour of the accused and so their conviction was not liable to be quashed on that ground.²³⁶ Directions should be given as regards the opportunity of recognition and failure to recognise, if such be the case.²³⁷ The nature of the property as bearing on the question of identification should be clearly put to the Jury.²³⁸

The accused were charged under S. 395 I. P. C. But in charging the Jury the Judge made reference to Ss. 448 and 323 I. P. C. and the Jury convicted the accused under Ss. 448 and 323 I. P. C., and not under S. 395 I. P. C. *Held*, that what the Judge referred to was not the prosecution case; that there was no charge under Ss. 448 & 323 I. P. C., and the accused had no notice of any such case, and that hence S. 237 Cr. P. C., had no application to these facts and there was clearly a misdirection vitiating the trial.²³⁹

S. 396 I. P. C.

Dacoity with murder.—

The accused were charged under S. 396 I. P. C. The Judge told the Jury that if they found that the persons taking part were not shown to be five in number, they could then split up the charge under S. 396 and treat it as a charge under S. 302 together with a charge under S. 392 I. P. C., that is to say, treat it as a substantive charge of murder *plus* a substantive charge of robbery. The Jury convicted on these charges. *Held*, that the charge under S. 302 is not a minor charge to the charge under S. 396, and the Judge's direction was wrong.²⁴⁰

S. 397 I. P. C.

Dacoity with grievous hurt or attempt to cause death or grievous hurt.—

The Judge should explain to the Jury how the offence fell under S. 397 I. P. C.: whether because grievous hurt was caused or because a deadly weapon was used, or both.²⁴¹ Even where the charge to the Jury cannot be said to be defective on the score of misdirection or non-direction, it is necessary, where several accused are charged under S. 397 I. P. C., for

235. *In re Raman* (1930) 54 M. 588: 32 Cr. L. J. 1212: A. I. R. 1931 M. 427: 134 I. C. 801. See also *Duraiswami* (1930) 1930 M. W. N. 1142: 32 Cr. L. J. 973: A. I. R. 1931 M. 481 133 I. C. 7; *Mookkandi* (1933) 1 Weir 446. *In re Abbas Ali Sahib* (1927) 53 M. L. J. 732: 29 Cr. L. J. 5: A. I. R. 1928 M. 144: 106 I. C. 341; *In re Perumal Thevan* (1929) 1929 M. W. N. 788: 31 Cr. L. J. 451: 122 I. C. 650.
236. *Sinna Tevan* (1939) 9 Cr. L. J. 311: 1 I. C. 546 (M).

237. *Shaikh Abdul* (1924) 26 Cr. L. J. 606: A. I. R. 1925 C. 887: 85 I. C. 830.
238. *Madhub Mal* (1864) 1 W. R. 22; *Ina Sheikh* (1885) 11 C. 160.
239. *Meher Sheikh* (1931) 59 C. 8: 35 C. W. N. 945: 32 Cr. L. J. 892: A. I. R. 1931 C. 414: 132 I. C. 254.
240. *Madhusingh* (1931) 36 C. W. N. 890 (S. B.): 34 Cr. L. J. 524: A. I. R. 1933 C. 294: 143 I. C. 14.
241. *In re Laxumana* (1898) 2 Weir 385.

the Jury to be satisfied that the accused was using a deadly weapon and to appreciate that it is not enough for a charge under that Section to show that he was a member of a body of persons, some of whom had such weapons. Where it was not certain whether the Jury had really directed their minds to this aspect, a conviction under S. 397 I. P. C. cannot stand.²⁴² S. 397 I. P. C. applies only to the case of the offender who actually uses a deadly weapon, or causes grievous hurt, and not to the case of persons associated with such offender in the offence.²⁴³

S. 398 I. P. C.

Attempt to commit robbery or dacoity armed with deadly weapon.—

On a charge under S. 398 I. P. C., the attention of the Jury should be drawn to the evidence relating to the weapon which the accused is said to have been armed with.²⁴⁴

S. 401 I. P. C.

Belonging to a wandering gang of thieves.—

The prisoners belonged to the tribe of snake-charmers. It was sworn at the trial that several thefts had occurred in the same neighbourhood about the same time, and various articles produced, which had been recovered by the Police with the assistance of the prisoners, were identified as stolen. It was also sworn that the 1st and the 2nd prisoners had confessed, but the prisoners denied this, admitting, however, that they had pointed out the places of concealment of the property before the Court. The Sessions Judge directed the Jury as follows: "There seems to be no doubt that the articles now before the Court consist of stolen property. The points for you to decide are whether the prisoners stole them, and whether numbers of thefts which occurred about the same time in the same neighbourhood show that the prisoners form part of a gang associated for the purpose of habitually committing thefts." The High Court said: "In this case we are of opinion that the summing up is defective, in not having put clearly to the Jury—1. The necessity of proving association and 2. The need of proving that the association was for the purpose of habitual thefts, and that habit is to be proved by an aggregate of acts".²⁴⁵

S. 406 I. P. C.

Criminal breach of trust.—

Where a Judge in his summing up to the Jury said that the accused was guilty of the offence of criminal breach of trust upon the basis that he became an executor *de son tort*;

242. Labedan (1930) 32 Cr. L. J. 476; A. I. R. 1931 P. 49; 130 I. C. 267.

243. Komali Viswasam (1886) 1 Weir 450; In re Annachella Tevan (1911) 22 M. L. J. 186; 13 Cr. L. J. 42; 13 I. C. 282.

244. Chan Hok (1911) 4 Bur. L. T. 198; 12 Cr. L. J. 463; 11 I. C. 1004.

245. Shriram Venkatasami (1871) 6 M. H. C. R. 123; 1 Weir 452.

held, that this was a misdirection and the conviction was bad in law.²⁴⁶ In a case of criminal breach of trust of specific items, the charge should show that the Judge required the Jury to find separately as to each specific misappropriation charged, and the verdict delivered should be specific as to each.²⁴⁷

In a case under S. 409 I. P. C., the intention of causing wrongful loss or wrongful gain should be emphasized and those terms should be explained.²⁴⁸

Ss. 411 and 412 I. P. C.

Receiving stolen property.—

Under S. 411 I. P. C., the possession of stolen goods by the accused must be possession 'soon after the theft', or the stolen goods must have been 'recently' stolen. Where the prisoner is charged with receiving stolen property, when the prosecution has proved the possession by the prisoner and that the goods had been recently stolen, the Jury may be told that they *may*, not that they *must*, in the absence of any reasonable explanation, find the prisoner guilty. But if an explanation is given which may be true it is for the Jury to say on the whole evidence whether the accused is guilty or not, that is to say, if the Jury think that the explanation may reasonably be true, though they are not convinced that it is true, the prisoner is entitled to an acquittal, because the Crown has not discharged the *onus* of proof imposed upon it of satisfying the Jury beyond reasonable doubt of the prisoner's guilt. The *onus* never charges; it always rests on the prosecution.²⁴⁹

The Judge charged the Jury as follows: "The law allows you to assume that if stolen property is found in a man's possession, he knows it to be stolen property unless he proves the contrary." *Held*, that it is a serious misdirection. Lort-Williams, J. observed as follows:—"This Court has pointed out again and again that in cases of receiving, the onus of proof never passes to the accused. The Crown must prove guilty knowledge. Under S. 114 illustration (a) of the Evidence Act, the Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods, knowing them to be stolen, unless he can account for his possession. If he gives an account of his possession which may reasonably be true, though the Jury are not convinced that it is true, and there is no other evidence of his guilty knowledge, the prisoner is entitled to an acquittal. There is no obligation to prove that the property is his. All that he is required to do is to give an account, and if that account may reasonably be true, though nevertheless the Jury may not be convinced that it is true, he must be acquitted, because the Crown have failed to satisfy

246. *Susen* (1930) 58 C. 1051 (S. B.): 35 C. W. N. 425: 32 Cr. L. J. 836: A. I. R. 1931 C. 184: 132 I. C. 145.

247. *Ramchandra Govid Harshe* (1895) 19 B. 749.

248. *Browne* (1913) 7 Bur. L. T. 20: 15 Cr. L. J. 257: 23 I. C. 465.

249. *Hathim Mondal* (1920) 24 C. W. N. 619: 31 C. L. J. 310: 21 Cr. L. J. 545: 56 I. C. 849

[referring to *R. v. Isaac Schama and Jacob Abramovitch* (1914) 11 Cr. A. R. 45: 79 J. P. 184]. See also *Aubrey* (1915) 11 Cr. A. R. 182, *Grinberg* (1917) 12 Cr. A. R. 259: *Badash* (1917) 13 Cr. A. R. 17. *Also see Brain* (1918) 13 Cr. A. R. 197 in which it was held that "Has the defendant proved himself innocent?" is a misdirection.

the onus which always remains upon them to prove his guilty knowledge. In the hope that this principle of law may some day be appreciated by the learned Judges in the subordinate Courts, I again refer to the judgment of Lord Reading, Lord Chief Justice, in the case of *R. v. Isaac Schama and Jacob Abramovitch* (1914) 11 Cr. A. R. 45, which has been referred to on several occasions in the judgments of this Court." It was *held* further that, upon the facts disclosed in this case the only offence, of which the accused could have been convicted under proper direction, was one of receiving under S. 411, and that by making use of the presumption under S. 114 (a) of the Evidence. No order of retrial, however, was made in this case, and the accused was acquitted in view of the fact that he gave an explanation which might reasonably be true that the plate (a common *thala*) was his and that it was a common article used in every Hindu household.²⁵⁰

Guilty knowledge is not necessarily a thing on which direct evidence can be afforded. It is a matter of conscience and connected with the secret motives of a man's conduct. It must be inferred from facts; for instance, if property sufficiently identified to be the property of one person is found to be in the possession of another person without leave or license or any legal permission of the owner, it is for the party in whose possession the property is found to account for the possession, and unless he can do so the Jury might fairly infer in such circumstances that it was with a guilty knowledge that the prisoner took that which he knew not to be his own.²⁵¹ A direction to the Jury that if they were satisfied that the article was stolen then there was a presumption that the man from whom it was recovered was guilty, is erroneous.²⁵² But it is not a misdirection to tell the Jury that if a person found in possession of recently stolen property cannot give a satisfactory explanation of his possession they are bound to convict.²⁵³ Also, there is a presumption that the accused on a charge of receiving stolen property will, if innocent, explain his possession at the earliest moment at his trial.²⁵⁴ Where a *prima facie* case is made out and the defendant, by his defence, offers an explanation, the Jury should be directed that the burden of proof that the offence charged has been committed is still on the prosecution, and if upon a review of evidence on both sides they are in doubt they ought to acquit. It is a misdirection to tell the Jury that because the evidence for the prosecution established a *prima facie* case, the burden of proof is shifted to the defendants.²⁵⁵

It had been, however, held in an early decision of this Court that it is no misdirection for a Judge to tell the Jury that, if the prisoner could not prove the truth of his story how he became possessed of certain articles (however small in value and common in use they may have been), it was their duty to convict him, for the presumption in such a case was legally valid that he knew that the property had been unlawfully acquired &c. It was observed in that case that the Judge drew the attention of the Jury especially to the defence, that the Jury

250. Daud Shaikh (1935) 40 C. W. N. 159.

251. Shuruffooddeen (1870) 13 W. R. 26.

252. Sanya Charan (1924) 52 C. 223 : 26 Cr L. J. 1155 ; A. I. R. 1925 C. 666 : 88 I. C. 515 ; Kabatulla (1925) 53 C. 157 : 42 C. L. J. 212 ;

26 Cr. L. J. 1582 : A. I. R. 1925 C. 1241 : 90 I. C. 542.

253. Poolman (1909) 3 Cr. A. R. 36.

254. Theodoras (1909) 3 Cr. A. R. 269.

255. Stoddart (1909) 2 Cr. A. R. 217.

thought proper to reject this defence and to believe the case for the prosecution, and that under this belief the presumption pointed out by the Sessions Judge became a fair legal presumption. It was also observed that the articles, it may be true, were of small value and in common use, but these are matters for the Jury.²⁵⁶ Where the Sessions Judge in his charge to the Jury merely directed them to find whether the property was stolen and whether it was retained by the accused : *Held*, that the charge was defective and amounted to a misdirection. The Sessions Judge should have directed the Jury to find : (1) whether the property was stolen, (2) whether it was dishonestly retained, and (3) whether the accused knew or had reason to believe the same to be stolen property. Unless these questions were found by the Jury in the affirmative the accused could not legally be convicted of an offence under S. 411 I. P. C.²⁵⁷ In cases under S. 411 I. P. C., the Judge should pointedly draw the attention of the Jury to the nature of the property as bearing on the question of identification. In the case of a *thali*, an article of common use, the High Court observed thus :—'We think there has been a misdirection in the case of the appellant. He has been convicted of dishonestly retaining in his possession stolen property, the only evidence against him being that a *thali* said to have been stolen from the prosecutor was found under his arm, he being the brother-in-law of the female prisoner. Now, this *thali* was not produced at the trial and recognition of things not before the eyes of deposing witnesses is not evidence against a prisoner accused of having been in possession of those things. Moreover, there was no attempt to prove that the prisoner J had a guilty knowledge that the *thali* had been stolen. He was admittedly unconnected with the theft, and lived a considerable distance off ; and supposing for argument's sake that the *thali* (an article common in all houses) brought to his house by his sister-in-law was the identical one stolen from the Pasee there would be no presumption that J knew it to be so or had any reason to suppose that it was so. We consider that these points in favour of the prisoner ought to have been brought prominently to the notice of the Jury and that the neglect of the Judge to do so was a substantial misdirection prejudicing the accused's case.'²⁵⁸ In a charge under S. 379 and S. 411 I. P. C., alternatively, the Judge should tell the Jury that it is open to them to find the accused guilty of theft or only of receiving stolen property, having regard to the presumption contained in S. 114 of the Evidence Act.²⁵⁹

Where the defence is that the property charged is not stolen, the question of identity must be put to the Jury.²⁶⁰ But in exceptional cases the facts may be such that the Judge may assume in his summing up that the property was stolen.²⁶¹ The Jury should be told that if the explanation may be true the prisoner cannot be convicted ;²⁶² so also, if the

256. Narain Bagdee (1866) 5 W. R. 3,

257. Balya Somya (1890) 15 B. 369. *See also* Reghiline (1865) 4 W. R. 21.

258. Musst. Joomnee (1867) 8 W. R. 16. *See also* Madhub Mal (1854) 1 W. R. 22 ; Ina Sheikh (1885) 11 C. 160,

259. Ganga (1934) M. W. N. 374.

260. Clay (1909) 73 J. P. 250 C. C. A. : 3 Cr. A. R. 92 ; Bruhin (1915) 11 Cr. A. R. 276 ; Buol (1915) 11 Cr. A. R. 306.

261. Austen (1916) 12 Cr. A. R. 171.

262. Field (1910) 4 Cr. A. R. 190 ; Dawson (1926) 19 Cr. A. R. 128.

explanation is reasonable.²⁶³ Recency of possession is a question for the Jury.²⁶⁴ The direction of the Judge must deal with the question of knowledge of the prisoner.²⁶⁵ Joint possession is a question of fact which has to be proved and should not be presumed.²⁶⁶ In a proper case the Jury should be told that the property found in a room let to a tenant may nevertheless be in the possession of the lessor.²⁶⁷ Recklessness or carelessness is not sufficient to constitute guilty knowledge that property has been stolen.²⁶⁸ If stolen goods are sold at an undervalue, that is not conclusive of guilty knowledge and must be left with other facts to the Jury.²⁶⁹

It is incumbent on the Sessions Judge to explain to the Jury that, in order to convict the accused under S. 412 I. P. C., it is necessary to find that they retained or had possession of the goods with guilty knowledge.²⁷⁰ He must also point out that it must be found that the accused knew or had reason to believe that the property found in his possession was transferred by the commission of dacoity.²⁷¹ As to the nature of the evidence on which the Jury may convict under S. 411 I. P. C., see *Q. v. Jogeshur*.²⁷² In considering whether the possession of stolen goods raises a presumption of dishonest receipt of stolen property, the attention of the Jury should be drawn to the necessity of satisfying themselves that the possession is clearly traced to the accused; the fact of stolen property being found concealed in a man's house would be sufficient to raise a presumption that he knew the property to be stolen property, but it would not be sufficient to show that it had been acquired by dacoity.²⁷³

The prisoners were convicted under S. 395 and also under the directions of the Judge under Ss. 411 and 412 I. P. C.. The High Court observed :—"The Judge left the case to the Jury in a way which was very likely to have produced a failure of justice. He properly directed the attention of the Jury to the points in which they ought to be satisfied before they could find the charge proved as against the prisoner. But he treats the evidence as a series of unconnected facts, without pointing out to the Jury the mutual relation, the sequence and coherence of the several facts which constitute the parts of that which makes up the proof. The Judge truly says that upon a charge of dacoity the first thing to be established by evidence is the commission of the offence, and the next, that the persons charged took part in the commission of that offence. The offence did not consist solely of breaking into a house by a body of men, but of breaking into the house and robbing and carrying off the property of the inmates. *** The finding of property, which must have been taken by the persons who committed the dacoity, in the possession of the accused, or in places where such property was concealed by them immediately after the commission of the crime, is evidence of the strongest descri-

263. *Hampson* (1915) 11 Cr. A. R. 75.

264. *Smith* (1910) 5 Cr. A. R. 77.

265. *Higginbotham* (1912) 8 Cr. A. R. 79.

266. *Leary* (1913) 9 Cr. A. R. 85; *Flatman* (1913) 8 Cr. A. R. 256.

267. *Eadie* (1922) 17 Cr. A. R. 26.

268. *Havard* (1914) 11 Cr. A. R. 2.

269. *Gregory* (1915) 11 Cr. A. R. 130.

270. *Taju Pramanik* (1898) 25 C. 711; 2 C. W. N. 369.

271. *Katiram* (1921) 25 C. W. N. cxii; *In re Mammadi* (1900) 2 Weir 515.

272. (1867) 7 W. R. 73.

273. *Malhari* (1882) 6 B. 731.

ption that the persons in possession of such property, or who were found concealing it, either themselves got possession of it by stealing it at the time of the dacoity, or got it from persons who were amongst the dacoits. Now, if there is no evidence and no reason to suppose that the prisoners are dealers in stolen property, if, as is the case, they are shown to have been associated and in company with others, on whom other portions of the stolen property were found, immediately before the time when the dacoity was committed, the evidence leads to the inference, not that they were dealers who had dishonestly bought stolen property from dacoits, but they themselves must have been amongst the persons engaged in the dacoity, and had acquired the property by such dacoity.*** Instead of directing the Jury that they might find the prisoners guilty of receiving stolen property acquired by dacoity, the Judge should have told the Jury that one crime, and one crime only, had been committed, and that if, from all the circumstances of the case, they believed that the crime which the prisoners had committed was dacoity, it was the duty of the Jury to convict them of dacoity. If, on the other hand, they thought that there was reasonable ground for doubting, in the case of any particular prisoner, whether he was actually present at the dacoity, they might find such prisoner guilty under S. 412 of receiving property acquired by dacoity, if they thought that the evidence fairly led to the inference that the prisoner must have been cognisant of the circumstances under which such property had been procured. But, if there was no evidence, or if the Jury entertained reasonable doubts whether the person so found in possession of stolen property took it under circumstances which enabled him to know, or may fairly have led him to infer that the property had been acquired by dacoity, if they thus believed that he took it under circumstances which would lead to no other inference than that the property had been dishonestly obtained, then they might convict under S. 411. It was a clear error to convict the prisoner both under S. 411 and S. 412, when there was no evidence of the commission of more than one offence". The conviction under Ss. 411 and 412 were set aside.²⁷⁴ Lapse of time between the dacoity and the discovery of the property should be pointed out to the Jury.²⁷⁵ In a trial for dacoity and receiving stolen property, the Judge in his charge to the Jury directed them that the fact of a stolen shirt having been found in the possession of the accused two months after the dacoity was sufficient to justify them in convicting the accused of dacoity. *Held*, that this was a misdirection; that whether the possession of the property was recent enough to warrant a conviction for dacoity was a matter entirely for the Jury.²⁷⁶

S. 413 I. P. C.

Habitually dealing in stolen property.—

As regards a charge under S. 413 I. P. C., it should be borne in mind that the very essence of the offence is the habitual, that is to say constant, receipt of or dealing in goods

274. Shahabut Sheikh (1870) 13 W. R. 42.

275. *In re Mammadi* (1900) 2 Weir 515.

276. *Guzzala Hanuman* (1902) 26 M. 467 : 2 Weir

517. *See, however, In re Muthu Veera Velan* (1928) 1929 M. W. N. 517 : 30 Cr. L. J. 542 : 115 I. C. 831.

which the prisoner knew or had reason to believe were stolen. In a case under this Section the High Court said :—"We do not think that a man can be said to be habitually receiving stolen goods who may receive the proceeds of a dozen different robberies from a dozen different thieves on one and the same day ; but in addition to the receipt from different persons there must be receipt on different occasions and on different dates."²⁷⁷

S. 414 I. P. C.

Assisting in concealment or disposal of stolen property.—

Where the Judge put it strongly to the Jury that the prisoner was proved by his own confession and by the evidence of the witnesses to have concealed the property, but made no mention of the fact that it was necessary for the Crown to prove, either directly or inferentially, that the prisoner knew the property to have been stolen : *Held*, that this omission decidedly prejudiced the prisoner's case to the Jury and was a clear misdirection.²⁷⁸

Ss. 417 and 420 I. P. C.

Cheating.—

In *R. v. Cooper*,²⁷⁹ Lord Coleridge, C. J. said,—“The question in all these cases is what was intended to be conveyed to the mind of the prosecutor by the acts, conduct or silence of the prisoner. If a particular idea is intended to be conveyed to his mind, and is conveyed and if it be false, the statute is satisfied”. In *R. v. Barnard*,²⁸⁰ Bolland, B. in summing up said : “If nothing had passed in words I should have laid down that the fact of the prisoner's appearing in cap and gown (in that case the prisoner was indicted for having falsely pretended that he was an undergraduate of the University of Oxford and a Commoner of Magdalen College and by means of these false pretences obtained a pair of bootstraps from a bootmaker) would have been pregnant evidence from which a Jury should infer that he pretended he was a member of the University and, if so, would have been a sufficient false pretence to satisfy the statute. It is clearly so by analogy to the cases in which offering in payment the notes of a Bank which has failed, knowing them to be so, has been held to be a false pretence, without any words being used”.

The pretence upon which the prosecution relies must be precisely put to the Jury.²⁸¹ How long a false pretence continues to operate is a matter for the Jury.²⁸²

For an offence of cheating the Jury should be told that there must be an intention to deceive and defraud at the time of taking the money, if the case be one of taking the money,

277. Baburam Kansari (1891) 19 C. 190.

278. Jaffi Ali (1873) 19 W. R. 57, 62.

279. (1877) 2 Q. B. D. 510; 13 Cox 617.

280. (1837) 7 C. & P. 784.

281. Heath (1912) 7 Cr. A. R. 247.

282. Moriton (1913) 8 Cr. A. R. 214.

and that the mere taking of money one day and dishonesty running away the next day is not necessarily cheating ; the subsequent conduct of the prisoner would only be evidence to show the prisoner's dishonest intention.²⁸³

S. 447 I. P. C.

Criminal trespass.—

The Judge should explain to the Jury the difference between civil and criminal trespass. Criminal trespass depends on the intention of the offender and not upon the nature of the act ; and when a man's intention is to save his family and property from imminent destruction, it cannot be said that because he, with that object in view, commits civil trespass on his neighbour's land and enters portion of his neighbour's property (which he ordinarily would not be justified in doing), he is guilty of any criminal trespass.²⁸⁴

S. 464 I. P. C.

Forgery.—

Sir James Fitzjames Stephen says²⁸⁵ :—

"An intent to defraud is presumed to exist if it appears that at the time when the false document was made there was in existence a specific person, ascertained or unascertained, capable of being defrauded thereby, and this presumption is not rebutted by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact ; nor by the fact that he had, or thought he had, a right to the thing to be obtained by the false document. The presumption may be rebutted by proof that at the time when the false document was made there was no person who could be reasonably supposed by the offender to be capable of being defrauded thereby, but it is not necessarily rebutted by proof that there was no person who could in fact be defrauded thereby. It is uncertain whether, in the absence of any evidence as to the existence of any person who can be defrauded by a false document, an intent to defraud will or will not be presumed from the mere making of the document."

In his charge to the Jury, the Judge said : "If a person who put his thumb impression in the register as M was not really M, it is clear that he made a false statement within the meaning of S. 464 I. P. C., and that his intention was that fraud should be committed and also that the injury should be caused to M. He therefore committed forgery." *Held*, there was misdirection, as he did not leave it to the Jury, as he should have done, to say whether on the evidence they found that the intention of the accused was dishonest or fraudulent.²⁸⁶

283. Heeramun (1866) 5 W. R. 5.

284. Madan (1913) 41 C. 662 ; 18 C. W. N. 668 ;
15 Cr. L. J. 155 ; 22 I. C. 731.

285. Digest of Criminal Law.

286. Asimoddi (1918) 22 C. W. N. 572 ; 19 Cr.
L. J. 649 ; 45 I. C. 841.

In a case where the accused was charged under S. 471 for having used a forged document namely a Kabuliat, the forgery having consisted in inserting a certain name among the names of the attesting witnesses to the execution of the document, and the Sessions Judge charged the Jury as follows : "The question is whether that constitutes forgery * * * If the purpose was to deceive the Court in believing that the person whose name was inserted as an attesting witness was really an attesting witness, then the act was a fraudulent one, and the insertion of that name was done fraudulently. The Jury may take it from me * * * that such insertion would be the making of a false document, and if the object was to support a claim or title or with intent that fraud may be committed, it was forgery. As already remarked, if the insertion of the name was done with the object of deceiving the Court as to who were the attesting witnesses, then the act was done fraudulently with intent to commit fraud or that fraud may be committed". Harington, J. said,—“In my opinion, the Judge in this case has misdirected the Jury. He should have told them that the interpolation of the appellant's name as a witness, assuming that they were prepared to find that the appellant had interpolated the name, was not an alteration of the document in a material particular within the provisions of Section 464, Sub-section (2). And further, I think he should have directed them that there was no evidence on which they could find an intent other than an intent that it should be believed that the accused was able, if called as a witness, to prove the document, and that however dishonest that intent was, it did not come within Section 464 so as to make the document a false document within that Section". In this case there was a difference of opinion between Harington, J. and Teunon, J. and the matter being referred to Mookerjee, J. he agreed with the former.²⁸⁷

A charge to the Jury should set out the nature of the document.²⁸⁸

A conviction for forgery under the Penal Code cannot be had unless it is proved that the accused *himself* made a document or part of a document with the intention of causing it to be believed that such document or part of a document was made by the authority of a person (here, Z) by whose authority he knew that it was not made. Moreover Z, when he by his own account signed a blank receipt and handed it to B, impliedly gave authority to some one to fill up the blank. Was that authority limited to the sum of Rs. 4. 14 as. (the case being that the receipt of Z had been got to a blank form under pretence that it should be filled up with Rs. 4. 14as. and that afterwards it was filled up with Rs. 9. 8as.) or was it intentionally or from indifference made general? If the latter, clearly no forgery at all was committed, although the cheating might remain. This question therefore should have been put to and determined by the Jury instead of being summarily disposed of by the authoritative statement of facts made by the Judge.²⁸⁹ A Judge charged the Jury to the effect that they would see in the *dakhila* that certain part had been tampered with. *Held*,—"We think that the Judge had every right to draw the attention of the Jury to anything which appeared to be a palpable alteration or blot on the face of the document. By doing so he

287. *Surendra* (1910) 38 C. 75 : 14 C. W. N. 1076 : 12 C. L. J. 277 : 11 Cr. L. J. 505 : 7 I. C. 629.

288. *Gangaram* (1869) 6 B. H. C. R. 43.

289. *Ramgopal* (1868) 10 W. R. 7.

certainly did not prejudice the case, for he distinctly states that they were to look into and consider all the facts in the case and then say whether the prisoners were guilty of forgery or not.²⁹⁰

S. 471 I. P. C.

Using a forged document.—

Where there was an apparent want of motive in making certain alterations in the dates of the blank stamps which were appended to the plaint filed by the prisoner to make up the institution stamp, and consequently the question was whether there was any fraudulent or dishonest intention, the Judge ought to have directed the attention of the Jury to the above apparent want of motive, and have left it to them to decide whether, under the circumstances, a fraudulent or dishonest intention could be fairly inferred or presumed; but instead of doing so, he directed them to consider whether the prisoner was interested in making the alterations, and, if so, to infer a dishonest motive. It was held that there must be a fraudulent and dishonest using of a document as genuine before a conviction can be had under S. 471 I. P. C., and a new trial was ordered.²⁹¹ In a case under S. 466 read with S. 471 I. P. C., where the seal and the signature on the document were illegible, the Sessions Judge observed that the seal did not correspond with any official seal, and on it was a scrawl by way of signature, apparently an attempt to imitate the appearance of English writing but perfectly illegible. He, however, left the question to the Jury and the Jury found that the prisoner used the document purporting to be a forged document made by a public servant in his official capacity. It was said that there was evidence to go to the Jury and their finding was warranted.²⁹²

A man may be said to use a document fraudulently even if it is used to support a good title, and it matters not whether the Court acts upon it or not.²⁹³

In a trial held by Jenkins, J. with the aid of a Jury in which the prisoner was tried on a charge under S. 471 read with S. 465 I. P. C., a reference being made under Clause 25 of the Letters Patent and Section 434 Cr. P. C., the Calcutta High Court by a Full Bench overruled the decision in the case of *Q. E. v. Haradhan* (1892) 19 Cal. 380 and held that deprivation of property, actual or intended, is not an essential element in the offence of fraudulently using as genuine a document which the accused knew or had reason to believe to be false.²⁹⁴

The accused were charged under S. 471 I. P. C., with having used a document in a suit brought against them by the vendor of their sister to recover possession of certain property acquired by her by right of inheritance from her father and that document purported to be a deed of gift from their father. It appeared that the accused were in possession of the property, but it was proved that the endorsement of registration which appeared in the document was a forgery. In his charge to the Jury the Sessions Judge (1) gave a brief history of the case as

290. *Kissoree* (1872) 17 W. R. 58.

291. *Jaha Bux* (1867) 8 W. R. 81.

292. *Prosunno Bose* (1866) 5 W. R. 96.

293. *Abaji Rama Chandra* (1891) 16 B. 165.

294. *Abbas Ali* (1896) 25 C. 512 (F. B) 1 C.W.N. 255.

proved in the evidence, in the course of which he alluded to the fact that the Munsiff in the Civil Suit had "held the *heba* propounded to be a forgery and directed the criminal prosecution which ended in the trial"; (2) referring in detail to the evidence showing that the registration endorsement was a forgery said, "If my opinion is of any use to you I have no hesitation in stating that it seems to me to show as clearly as can be shown by such means that the document A was not really attested or registered by any official Kazi of Jahanabad, and that thus, so far as the certificates of such attestation and registration go, these are forgeries; (3) went on to say,—“It does not, of course, necessarily follow that the document itself is a forgery because these certificates on it are forged, but it does follow in the nature of things that the document too should be regarded with suspicion, and that the clearest evidence of its genuineness and authenticity should be required before it is accepted as genuine; primarily it would be for those who assert the genuineness of the document to prove this by evidence of those attesting witnesses who are alive still, as it is in evidence that some are”; (4) after discussing the evidence of three witnesses for the prosecution examined to prove that certain signatures purporting to be those of three of the attesting witnesses to the document are not really their signatures, concluded his observations upon the testimony of those witnesses with the remark that “little or nothing against the document can be gathered from such evidence”; and (5) concluded as follows: “On the evidence you must decide whether or not you believe the document A to be a forgery; if you find it to be a forged document, you must ask yourselves whether or not the accused must have known it to be a forged document. If you find they knew this, you should convict them, as they acknowledge the use of it”. *Held*,—as regards (5) that the directions were not sufficient, because the prosecution, in connection with this point, must prove also that the use of the document was made by the accused ‘fraudulently’ or ‘dishonestly’ in the sense in which these two terms are used in the Penal Code; that in order to prove this fact the prosecution must show that the accused had no reasonable ground for asserting their title to the land in dispute, that the factum of possession and the date of the death of the father of the accused persons are material points for consideration with reference to this question; that if the sister of the accused, after the death of the father, had not been in possession of her share of the land in dispute for more than 12 years, the accused would have good ground for asserting their title to it, that the Judge had wholly omitted to deal with this part of the case and the omission materially prejudiced the accused; as regards, (2), (3) and (4) that the onus was wrongly placed on the accused, because it was for the prosecution to establish the forgery and it was the duty of the prosecuting Counsel to call such of the attesting witnesses as were alive, as witnesses; and as regards (1) that the finding of the Munsiff in the Civil Suit could not be used as evidence and the Judge should have, but had not, referred to the evidence bearing upon the question of the accused’s knowledge or belief.²⁹⁵ When a person, in the course of an action brought against him to gain possession of a property, uses a forged document for the purpose of supporting his title though there may be no necessity for the use of it, such user is clearly fraudulent. A general intention to defraud without the intention of causing wrongful gain to one person or wrongful loss to another would, if proved, be

295. Khorshed Kazi (1881) 8 C. L. R. 542.

sufficient to support a conviction ; and such an intention is a necessary inference which the Jury should be directed to draw, if they are satisfied that the accused has uttered a forged document as a true one, meaning it to be taken as such and knowing it to be forged.²⁹⁶

S. 477A I. P. C.

Falsification.—

In a charge of falsification of accounts it is necessary to show not merely false entries in the books or accounts but that such false entries were made with intent to defraud, and the question of the intent with which such entries were made is for the Jury.²⁹⁷

S. 489B I. P. C.

Uttering false coins, etc.—

The Judge ought not to stop merely at recording the verdict about the accused having uttered particular notes at particular places but should ascertain from them their opinion as to whether the said notes had been uttered with the knowledge of their being forged. When the verdict recorded by the Judge does not contain this, the verdict is inconclusive and incomplete. The High Court cannot supply by conjecture or inference the omission on the part of the Sessions Judge to ascertain from the jurors themselves what they meant by their verdict by questioning them under S. 303 Cr. P. C. If the Jury gave their verdict as "guilty under S. 489 B," there would have been no ambiguity.²⁹⁸

S. 494 I. P. C.

Bigamy.—

In a case under S. 494 I. P. C., the Judge directed the Jury that as a matter of law the first husband is not the person aggrieved by the offence and that in his opinion the only person aggrieved is the person with whom the second ceremony was gone through. On that, facts were not tried, but the Jury, in pursuance of the direction of the Sessions Judge, returned a verdict of not guilty and the accused was acquitted. On an appeal being preferred by the Government it was said : "If he (the Judge) refers to the words of the Section they would show him that the grievance may not be confined to a single individual. In the case of *Q. E. v. Bai Rukshmoni* (1886) 10B. 340, it was admitted by all at the Bar that a husband would be a person aggrieved under S. 494 ; and in the matter of *Ujjala Bewa* (1878) 1 C. L. R. 523 the Judges were of the same opinion".²⁹⁹

On a trial for bigamy the onus of proving that the prisoner knew that his other spouse was alive at a given time is on the prosecution.³⁰⁰

296. *Dhunum Kaze* (1882) 9 C. 53 : 11 C.L.R. 169.

297. *Drewett* (1904) 69 J. P. 37.

298. *Saldeo* (1935) 37 Cr. L. J. 182 : A. I. R. 1936 O. 164 : 159 I. C. 919.

299. *Sarna Kahmi* (1899) 26 C. 336.

300. *Lund* (1921) 16 Cr. A. R. 31 ; *Peake* (1922) 17 Cr. A. R. 22.

S. 498 I. P. C.**Enticing.—**

In a case tried by Bittleston, J. the evidence was, and the Jury found as a fact, that the woman asked the prisoner to allow her to go with him, that all the solicitations proceeded from her and that the prisoner for sometime refused to yield to her request. He told the Jury that this did not, in his opinion, absolve the prisoner from the charge, that S. 498 of the Code was framed for the protection of the husband, and that, though the request and solicitation came wholly from the wife yet, as the prisoner had yielded to it, and gone away with her, there was a sufficient taking on his part within the meaning of the Section. Feeling some doubt whether the direction was right he reserved the question for the decision of the High Court. The High Court held that the direction was correct, and observed: "This Section and the preceding Section were evidently intended for the protection of husbands, who alone can institute prosecutions for offences under them. It is the taking or enticing of the wife from the husband or the person having the care of her on behalf of the husband for the illicit purpose that constitutes the offence. If, whilst the wife is living with her husband, a man knowingly goes away with her in such a way as to deprive the husband of his control over her with the intent stated in the Section, that, I think, is a taking from the husband within the meaning of the Section. The wife's complicity in the transaction is no more material on a charge under this Section than it is on a charge of adultery."³⁰¹

S. 500 I. P. C.

In a case of defamation alleged to have been committed by the publication of a poem, Jenkins, J. charged the Jury as follows:—"The Jury must look at the whole poem and must take it as a whole, and they should read the poem as reasonable men and should see whether it was reasonably capable of the construction put by the prosecution. It was not necessary that the whole world should read it as a libel, but the question was whether those who knew the parties, by putting a reasonable construction on the poem, would consider it to refer to the complainant. The opinion of experts are not binding on the Jury, for it is with the Jury and not with those witnesses that the determination of the case rested. The weight due to the testimony of those witnesses was a matter to be determined by the Jury and that weight would be proportionate to the soundness of the reasons in its support. The intention has to be inferred from the act itself; what the Jury must see was whether the natural result of the act was not to harm the reputation of the persons attacked."³⁰²

The question of 'publication' is ordinarily one of mere fact to be decided by the Jury; but this like all other legal and technical terms involves law as well as fact;

301. *Kumarasami* (1865) 2 M. H.C.R. 331 : 1 Weir 569.

302. *Kali Prasanna* (1897) 1 C. W. N. 465.

and it is a question for the Court in doubtful cases whether the facts, when proved, would constitute a publication in point of law.³⁰³

S. 511 I. P. C.

Attempt.—

S. 511 I. P. C., is not meant to cover only the penultimate act towards the completion of an offence and not acts preceding, if those acts are done in the course of the attempt to commit the offence, are done with intent to commit it and done towards its commission. Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation, is a question of fact in each case and should be left to the Jury.³⁰⁴

In *R. v. Cheeseman*,³⁰⁵ Blackburn, J. said :—"There is no doubt a difference between preparation antecedent to an offence and the actual attempt. But if the actual transaction has commenced, which would have ended in the crime if not interrupted, there is clearly an attempt to commit the crime." According to the more recent English cases, an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which could constitute its actual commission, if not interrupted.³⁰⁶

As to the distinction between S. 307 I. P. C., and S. 302 read with S. 511 I. P. C., see the case of *Francis Cassidy*,³⁰⁷ noted under S. 307 I. P. C., *ante*,

303. Stark on Slander, 6th Ed. P. 809.

304. In re R. Mac Crea (1893) 15 A. 173 [dissenting from Riasat Ali (1881) 7 C. 352 8 C. L. R. 572 and approved by the Judicial Committee in 15 A. 310].

305. (1862) L. & C. 140.

306. See Warburton's Leading cases on Criminal Law. See also Robinson (1915) 2 K. B. 342; Punch (1927) 20 Cr. A. R. 18.

307. (1867) 4 B. H. C. R. 17.

CHAPTER II.

Of Procedure.

S. 103 Cr. P. C.

The Sessions Judge in his charge commented on the evidence regarding the searches and asked the Jury to regard the evidence with the greatest possible suspicion, being of opinion that the precautions which the law requires were not duly observed. The points which he took were that the persons called upon to witness the searches were selected by the Head-constable and the Inspector, and were not shown to be respectable inhabitants of the locality ; that though the Inspector was present when the Head-constable searched the premises, he did not come to give evidence ; and that the Head-constable, in direct breach of the Police Regulations, was in plain clothes. *Held*, that the Jury were seriously misdirected by these remarks. S. 103 Cr. P. C. does not justify the view that the persons called upon to witness a search are to be selected by any person other than the Police-officer conducting the search ; that if the Sessions Judge considered the evidence of the Inspector necessary, he ought not to animadvert on his absence in charging the Jury but he should intimate his opinion to the Public Prosecutor and give him the opportunity of calling that official, and that it is wrong for a Judge in charging the Jury to say that a Head-constable committed a breach of the Police Regulations in conducting a search with a loose shirt on, without examining him on the matter, and taking evidence as to whether or not his body was examined before he began the search.¹ When the prisoners were in police custody at the time of the search, the Judge ought to have brought to the notice of the Jury that fact and it would then have rested with the Jury to draw any inference of fact they chose regarding the *bonafides* of the search.² Where there are circumstances calculated to lessen the force of adverse presumption from the possession of stolen articles discovered in the house of the accused in the course of the search, the Judge should draw the attention of the Jury to those circumstances and ought to aid them in coming to a conclusion by carefully summing up the evidence surrounding the discovery.³

Ss. 127 and 128 Cr. P. C.

Where the defence in a complaint under Ss. 149, 304 and 324 I. P. C., in substance, was that the Sub-Inspector and the accused, the two constables, under his orders, were acting in pursuance of the provisions contained in Ss. 127 and 128 Cr. P. C., and the prosecution as instituted was one that required no sanction, the Jury should be told that if they could not accept the case for the prosecution, they would next have to consider the provisions of Ss. 127 and 128 Cr. P. C. and determine whether the Sub-Inspector acted or meant to act under those Sections and whether the accused constables acted under his orders. If the Jury were unable

1. Ranan (1897) 21 M. 83 : 2 Weir 503.

2. Taju Pramanik (1898) 25 C. 711 : 2 C.W.N. 369.

3. Bykunt (1868) 10 W. R. 17.

to accept the case for the prosecution, and, on the contrary, accepted the defence as above set out, the prosecution could not be continued in the absence of the sanction of the Governor-General in Council and the accused were entitled to an acquittal. Only, if the Jury negatived both the case for the prosecution and the case for the defence, it was necessary for them to consider the further question then arising, namely, whether the accused acted in the exercise of the right of private defence and whether they had or had not exceeded that right. Where the above instructions were not given to the Jury, the verdict of the Jury, though concurred in by the Sessions Judge, was set aside.⁴

S. 154 Cr. P. C.

First information Report is not evidence in the case. It is tendered by the Crown for such use as the defence may be able to make of it and to test the consistency of the prosecution evidence. It is a misdirection when the Judge asks the Jury to accept the statement in the First Information in preference to the evidence in the case.⁵ The earliest version as given by an informant or a prosecutor should always be placed before the Jury in order to enable them to judge of the truth or falsity of the prosecution case.⁶ The First Information should always be placed before the Jury, the points in the case not mentioned therein being drawn to their attention.⁷ Where a Police Officer took the statement of a witness on a certain date but did not record it, and on a subsequent date he took the statement again and recorded it as the First Information and the Judge placed both the statements before the Jury and also omitted to tell them that the only use they could make of the latter statement was for the purpose of contradicting or corroborating the witness, or else that statement should be discarded altogether : *Held*, that it was a misdirection.⁸ The failure of a Judge to present in his summing up to the Jury the First Information in its true perspective, which affects the complicity of the different accused persons in the offence, constitutes a misdirection.⁹ Omission to place before the Jury an important incident mentioned in the First Information which may be in favour of the accused is a misdirection.¹⁰

In an offence of rape, the charge to the Jury must refer to the earliest version of the occurrence as given by the informant or the prosecutrix who is the principal witness to the occurrence, and on whose testimony practically the whole case depends, in order to judge

4. Abdul Rahim (1921) 25 C. W. N. 623 : 33 C. L. J. 340 : 22 Cr. L. J. 606 : 62 I. C. 878.

5. Asfar sheikh (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52.

6. Khijiruddin (1925) 53 C. 372 : 42 C. L. J. 504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.

7. Saberali (1920) 21 Cr. L. J. 666 : 57 I. C. 826 (C).

8. Dasarath Singh (1922) 23 Cr. L. J. 406 : A. I. R. 1923 P. 158 : 67 I. C. 502.

9. Jessarat (1925) 29 C. W. N. 526 : 26 Cr. L. J. 1009 : A. I. R. 1925 C. 729 : 87 I. C. 833.

10. Mamat Ali (1926) 44 C. L. J. 233 : 28 Cr. L. J. 19 : 99 I. C. 51.

of the truth or falsity of the prosecution case.¹¹ Omission to draw the attention of the Jury to the discrepancies between the First Information Report and the case as put forward before the Court, amounts to misdirection.¹² Where the Judge told the Jury that a judicial finding that the First Information Report was false was not binding upon them and they were at liberty to form their own conclusion, there is no defect in the charge and no misdirection.¹³

Where the original complaint was not filed, it is a misdirection if the fact of the prosecution not filing it is not mentioned.¹⁴ If the First Information Report is properly made evidence, it must be read out to the Jury as a whole, and if not the Judge should abstain from all reference to it.¹⁵ A chowkidar came to the police station and made a report to the effect that four labourers who had left their master were wrongfully taken back by the master through his man and that a certain person was struck on the head and wounded on the occasion. The Writer Head Constable recorded this statement in the police diary and sent a constable to bring the wounded man. The latter was incapable of making a statement. The next day the wife of one of the labourers came to the police station of her own free will and laid an information that her husband and sons had been carried off. Thereafter the investigation began. A few days later, one of the labourers who had escaped in the meanwhile also came to the police station and laid an information that he and three others had been kept in confinement by the accused. All the three statements had been recorded as First Information and admitted in evidence. *Held*, that the information laid by the wife was the First Information, but as the conviction was based upon the other evidence adduced at the trial and not on those statements there was no prejudice by reason of the erroneous admission of the other two.¹⁶

A counter-information laid by one of the accused persons, if it does not amount to a confession and so excluded by S. 25 of the Evidence Act, is admissible against the informant, but not against the other accused persons.¹⁷

S. 162 Cr. P. C.

Law on the Subject.—

Before we deal with the duty of the Judge in laying down the law on the subject of the admissibility of the statement or any portion of it made by any person to a Police-officer in the course of an investigation under Chapter XIV of the Code of Criminal Procedure, it will

11. Abdul Aziz (1934) 30 N. L. R. 262 : 35 Cr. L. J. 957 : A. I. R. 1934 N. 94 : 149 I. C. 447 [relying on Khijiruddin (1925) 53 C. 372 : 42 C. L. J. 504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.]
12. Dhiraji (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.
13. Wajid Ali (1927) 7 P. 153 : 30 Cr. L. J. 273 : A. I. R. 1929 P. 34 : 114 I. C. 220.

14. In re Muthaya Thevan (1926) 28 Cr. L. J. 307 : A. I. R. 1927 M. 475 : 100 I. C. 531.
15. Natabar (1908) 35 C. 531 : 12 C. W. N. 774 : 7 C. L. J. 599 : 8 Cr. L. J. 6.
16. Habib Khan (1928) 29 Cr. L. J. 728 : A. I. R. 1928 P. 634 : 110 I. C. 584.
17. Hazir Ali (1910) 14 C. W. N. 493 : 11 C. L. J. 301 : 11 Cr. L. J. 96 : 5 I. C. 315.

be useful to notice briefly the changes that have been made from time to time in the law on the said subject and how the present law stands.

History of the Section—S. 119 of the Code of 1872 ran as follows :—

“An officer in charge of the police-station, or other Police-officer making an investigation, may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and may reduce into writing any statement made by the person so examined.

“Such person shall be bound to answer all questions relating to the case, put to him by such officer, other than questions criminating himself.

“No statement so reduced into writing shall be signed by the person making it, nor shall it be treated as part of the record, or used as evidence.”

The above provisions were split up into two Sections in the Code of 1882 : S. 161 dealing with the first two paras with modifications, and S. 162 dealing with the matter contained in the third para with additions and alterations, and, as we are here concerned with the latter only, we quote only S. 162 of the Code of 1882 below.

S. 162 of the Code of 1882, as amended by Act X of 1886, S. 6, enacted as follows :—

“No statement, other than a dying declaration, made by any person to a Police-officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it, or shall be used as evidence against the accused.

“Nothing in this section shall be deemed to affect the provisions of S. 27 of the Evidence Act.”

S. 162 of the Code of 1898, prior to its amendment by S. 34 of Act XVIII of 1923, stood as follows :—

“(1) No statement made by any person to a Police-officer in the course of an investigation under this Chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence :

“Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof ; and such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act, 1872.

“(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of S. 32, Clause (1), of the Indian Evidence Act, 1872.”

The present Section, after its amendment by S. 34 of Act XVIII of 1923, stands as follows :—

“(1) No statement made by any person to a Police-officer in the course of an investigation under this Chapter shall, if reduced into writing, be signed by the person making it :

nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose (save as herein-after provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

"Provided that, when any witness is called for the prosecution whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145 of the Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination :

"Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

"(2) Nothing in this section &c. &c." (No change has been made in this sub-section).

To summarise : The statement of any person to the Investigating Police-officer, if reduced into writing under the Code of 1872,—could not be treated as part of the record, or used as evidence ; under the Code of 1882—could not be used *as evidence against the accused* ; and under the Code of 1893 (prior to its amendment by Act XVIII of 1923)—could not be used as evidence (whether for or against the accused), but might be used in the interests of justice to impeach the credit of the person if called as a witness for the prosecution. Under all the aforesaid Codes, therefore, such a statement, *if reduced into writing*, could not be used as substantive evidence in the case, as against the accused ; but there was one important difference between the Codes of 1872 and 1898 and the Code of 1882, viz, that while the former Codes confined themselves to stating only that such a statement would not be evidence in the case, the latter expressly stated that it could not be used as evidence *against the accused*, from which it might be implied that it could be used as evidence *in his favour*. In fact, it was held in some cases under the Code of 1882, that such statement, when legally brought as evidence before the Court by being duly proved, could be used in favour of an accused person.¹⁸

But though such a statement could not be used as substantive evidence in the case, it was held that it could be used for the purpose of impeaching the credit of a witness by showing that his previous statement to the Police had been inconsistent with his statement before the Court ;¹⁹ for, as observed by Nanabhai Haridas, J. in *Reg v. Uttamchand, ante* : "The object of a trial in every case is to ascertain the truth in respect of the charge made.

13. Mannu (1897) 19 A. 390 (F. B.) 422, 425 :
17 A. W. N. 174 ; Taj Khan (1894) 17 A.
57 : 14 A. W. N. 208.

19. Uttamchand (1874) 11 B. H. C. R. 120 ; Kali
Churn (1881) 8 C. 154 : 10 C. L. R. 51.

For this purpose it is necessary that the Court should be in a position to estimate, at its true worth, the evidence given by each witness, and nothing that is calculated to assist it in doing so ought to be excluded, unless, for reasons of public policy, the law expressly requires its exclusion." S. 145 of the Evidence Act provides that a witness may be cross-examined as to previous statements made by him, reduced into writing and relevant to the matters in question; "but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are used for the purpose of contradicting him." This it will be impossible for the accused or his Counsel to do, unless he has access to the writing and he is allowed to call for and see it. This consideration led some of the Judges to hold that the accused was entitled in the interests of justice to see previous statements of witnesses, called for for the prosecution, recorded by the Police under S. 161 of the Code, even if such statements were recorded, not separately, but in the police diary kept under S. 172 of the Code.²⁰ Aikman, J. further observed in the case of *Mannu*, ante: "But, whether or not it be held that an accused is entitled to see the record of previous statements made by witnesses who are giving evidence against him, there is no doubt that the Court can see them. In his judgment in the case of *Kallu*, post, Sir Meredyth Plowden observes that it is competent for the accused 'to move the Court, which is presumably impartial and endeavouring to ascertain the truth, to refer to the statements attributed in the diaries to a witness before the Court, and it is open to the Court, if need be, to cross-examine the witness after reference thereto.' With this observation I entirely agree.* * If Courts took advantage of the right given them by law to use police diaries to aid them in trials and inquiries, and so clear up all material contradictions appearing between the statements recorded in those diaries and the evidence given in Court, the privilege of seeing the statements would not be of so much moment to the accused or his advisors. But the Court may be pressed for time, or may fail to appreciate the bearing of the statements in favour of the accused."

When the Code of 1898 was enacted, a proviso was added to Sub-s. (1) of S. 162 which coincided with the view expressed by Aikman, J. and by omitting the words "against the accused" which were in the Code of 1882. It excluded the statement from being used as evidence of any kind and so reverted to the position created by the Code of 1872. It could only be used for the purpose of impeaching the credit of a prosecution witness.

The above observations relate to the statement, when reduced into writing; but the law did not contemplate that the statement *must* be reduced into writing by the Police-officer, he *might have* done so; and though the words "and may reduce into writing" in S. 161 of the Code of 1882 were omitted in the Code of 1898, S. 162 shows that the Police may still do so.²¹ So the provisions of the several Criminal Procedure Codes, prior

20. Dadan Gazi (1906) 33 C. 1023, 1027: 10 C.W. N. 890: 4 Cr. L. J. 79; Per Aikman and Banerji, JJ. in *Mannu* (1897) 19 A. 390 (F. B.) 422, 426: 17 A. W. N. 174; *Contra per* Edge, C. J., Knox, Blair and Burkitt, JJ. As instances of such contradictory views, see also

the judgment of Trevelyan and Rampini, JJ. in *Sheru Sha* (1893) 20 C. 642 which supported the views of Aikman and Banerji, JJ. and the judgment of Plowden, J. in *Kallu* 29 P. R. 55.

21. Dadan Gazi (1906) 33 C. 1023, 1026: 10 C. W. N. 890: 4 Cr. L. J. 79.

to Act XVIII of 1923, did not apply to or exclude *unrecorded statements* to the Police, and therefore such statements were admissible under S. 155 (3) and S. 157 of the Evidence Act; in other words, such statements could be used to impeach the credit of a witness, or to corroborate his statement before the Court.²² It was held in some cases that even if the statement was reduced into writing, that would not prevent the accused from getting the statements orally from the Police-officer if he remembered them, for S. 91 of the Evidence Act would not prevent it.²³ But the accused could derive very small advantage from such process, for if the Police-officer denied that such a contradictory statement was ever made to him the accused could have no other way of proving it except, perhaps, by calling a third person,²⁴ who was present at the investigation and heard it. As regards corroboration, it is against the interests of the accused. No doubt, such process might be advantageous to the Crown, for it could corroborate its own witnesses or contradict defence witnesses who were examined in the course of the Police Investigation. But the Crown would get little benefit from corroborating its own witnesses by previous statements before the Police, for a sworn statement solemnly made before Court needs no additional weight by an unsworn statement before a Police-officer; nor would its case against the accused be strengthened by discrediting defence witnesses, for a criminal case must stand or fall on the strength of the evidence for the prosecution and not on the weakness of the case for the defence.

The recorded statement might come in another way. It might be used by the Police-officer to refresh his memory, and thereby to contradict or corroborate the witness (S. 159 of the Evidence Act).²⁵ But the question would then arise, could an accused person compel a Police-officer to refresh his memory from the investigation records if the Officer declined to do so? In one case it was held that he could not do so,²⁶ and in another case it was held that the Court could compel the Police-officer to look into the diaries for the purpose of answering the question of the accused.²⁷

To avoid discussions based on Sections of the Evidence Act on a rule of Criminal Procedure, presumably enacted for the benefit of the accused, S. 34 of the Amending Act XVIII of 1923 thoroughly recasted Sub-s. (1) of S. 162.

22. Uttamchand (1874) 11 B. H. C. R. 120; Mannu (1897) 19 A. 390 (F. B.); 17 A. W. N. 174; Nilakanta (1912) 35 M. 247 (S. B.); 274: 13 Cr. L. J. 305; 14 I. C. 849; Muthukumaraswami (1912) 35 M. 397 (F. B.), 539: 13 Cr. L. J. 352; 14 I. C. 896.

23. Narayan (1907) 32 B. 111 (F. B.); 9 Bom. L. R. 789; 6 Cr. L. J. 164; Fanindra (1908) 36 C. 281; 13 C. W. N. 197; 9 C. L. J. 199; 9 Cr. L. J. 452; 1 I. C. 970; Rustom (1910) 7 A. L. J. 468; 11 Cr. L. J. 235; 6 I. C. 101.

24. Uttamchand (1874) 11 B. H. C. R. 120; Grandi Vetkatasubbiah (1924) 48 M. 640, 645, 650. See also Dadan Gazi (1906) 33 C. 1023; 10 C. W. N. 890. 4 Cr. L. J. 79.

25. Uttamchand (1874) 11 B. H. C. R. 120; Narayan (1907) 32 B. 111 (F. B.); 9 Bom. L. R. 789; 6 Cr. L. J. 164; Rustam (1910) 7 A. L. J. 468; 11 Cr. L. J. 235; 6 I. C. 101.

26. Kali Churn (1881) 8 C. 154; 10 C. L. R. 51.

27. Mohiuddin (1924) A. I. R. 1924 P. 829.

The law as it at present stands.—

Under S. 162, as amended by S. 34 of Act XVIII of 1923, it is not now permissible for statements to the Police, *whether oral or written*, to be put in evidence, in order to corroborate a prosecution witness, or to contradict a defence witness; a statement to the Police can only be used for one purpose, and that is, *by the accused* to contradict a prosecution witness in the manner provided by S. 145 of the Evidence Act.²⁸ There is no provision in the Section for allowing the Judge to use such statements for confronting the witnesses with them when he finds that at the trial they to some extent contradicted what they had stated against the accused in their statements to the Police-officer.²⁹ It is with the object of guarding against a true case being spoilt by an unscrupulous Investigating Police-officer that the provisions of S. 162 are enacted.³⁰ Statements made to Police-officers in the course of investigation are not part of the *res gestae* and cannot be used as substantive evidence at the trial; nor can criminal cases be proved by reproducing the contents of a note of an Investigating Police-officer.³¹ The accused is entitled to have copies only for the purpose of contradicting some statement made by the witness in Court and can obtain the same when the witness has made his statement in evidence before the Court and not before.³² In the amended S. 162, the Legislature has employed firm language palpably intended to make a clean sweep of the use at the trial of any statement to the Police during the investigation, not only in evidence, but for any purpose not covered by the subsequent

28. Vithu Balu (1924) 26 Bom. L.R. 965 : 26 Cr. L. J. 223 : A. I. R. 1924 B. 510 : 83 I. C. 1007 ; Rakha (1925) 6 L. 171 : 27 Cr. L. J. 438 : A. I. R. 1925 L. 399 : 93 I. C. 230 [dissenting from Mamchand (1924) 5 L. 324 : 25 Cr. L. J. 1201 : A. I. R. 1924 L. 609 : 82 I. C. 129] ; Hayat (1928) 10 L.L.J. 389 : 29 Cr. L. J. 282 : A. I. R. 1928 L. 380 : 107 I. C. 766 ; Adho (1925) 19 S.L.R. 6 : 26 Cr. L. J. 897 : A. I. R. 1925 S. 257 : 86 I. C. 961 ; Sheosatyanarayanlal (1925) 8 N. L. J. 217 : 27 Cr. L. J. 161 : A. I. R. 1926 N. 1 : 91 I. C. 945 ; Dadi Lodhi (1926) 27 Cr. L. J. 731 : A. I. R. 1926 N. 368 : 95 I. C. 59 ; Harendra (1924) 40 C. L. J. 313 : 26 Cr. L. J. 307 : A. I. R. 1925 C. 161 : 84 I. C. 451 ; Manna Lal (1923) 27 O. C. 40 : 25 Cr. L. J. 49 : A. I. R. 1925 O. 1 : 75 I. C. 753 ; Keramat (1925) 42 C. L. J. 524 : 27 Cr. L. J. 263 : A. I. R. 1926 C. 320 : 92 I. C. 439 ; Gahur (1925) 30 C. W. N. 503 : 27 Cr. L. J. 641 : A. I. R. 1926 C. 793 : 94 I. C. 593 ; Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227 ; Jadunandan (1927) 2 Luck

605 : 28 Cr. L. J. 802 : A. I. R. 1927 O. 321 : 104 I. C. 242 ; Ibrahim (1927) 8 L. 605 : 28 Cr. L. J. 983 : A. I. R. 1928 L. 17 : 105 I. C. 807 ; Jhari Gope (1928) 8 P. 279 : 30 Cr. L. J. 858 : A. I. R. 1929 P. 268 : 118 I. C. 130 ; In re Kallam Narayana (1932) 56 M. 231 : 64 M. L. J. 88 : 34 Cr. L. J. 481 : A. I. R. 1933 M. 233 : 143 I. C. 46 ; Diwan (1932) 33 P. L. R. 208 : 33 Cr. L. J. 637 : 138 I. C. 528.

29. Keramat (1925) 42 C. L. J. 528 : 27 Cr. L. J. 277 : A. I. R. 1926 C. 147 : 92 I. C. 453. *But See* Municipal Committee v. Mukand (1926) 27 Cr. L. J. 607 : A. I. R. 1926 L. 365 : 94 I. C. 271.

30. Debendra (1934) 35 Cr. L. J. 940 : A. I. R. 1934 C. 458 : 149 I. C. 139.

31. In re Venkatasubbiah (1924) 48 M. 640 : 26 Cr. L. J. 721 : A. I. R. 1925 M. 579 : 86 I. C. 209 ; Ausan Singh (1932) 9 O. W. N. 437 : 33 Cr. L. J. 566 : A. I. R. 1932 O. 247 : 138 I. C. 159.

32. In re Peramasami (1925) 27 Cr. L. J. 100 : A. I. R. 1926 M. 183 : 91 I. C. 532.

provisions of the Code, which provisions make but one exceedingly restricted exception. The limitations on the use of such statements are strict : (1) only the statement of a prosecution witness can be used, and (2) only if it has been reduced into writing ; (3) only a part of the statement recorded can be used ; (4) such part must be duly proved ; (5) it must be a contradiction of the evidence of the witness in Court ; (6) it must be used as provided in S. 145 of the Evidence Act. Such statement as does not contradict the testimony of the witness cannot be proved in any circumstances and it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the Investigating Officer.³³ When during the examination-in-chief of a Police-officer it was elicited from him that he examined on behalf of the accused two witnesses during the course of the investigation and that they had stated to him that they were not present at the occurrence ; *held*, that such statement ought not to have been allowed to be given in evidence. The mere fact that one of the persons so named by the Police-officer was cited by the defence would not justify the prosecution in getting out a statement made by him in anticipation of what he might say as defence witness.³⁴ The main object of the alteration in Ss. 161 and 162 of the Code is to prohibit the use of the statements of the prosecution witnesses as corroboration under S. 157 of the Evidence Act, and the general provisions of law with regard to admissibility of statements made by the accused, like other admissions, do not seem to be affected ; therefore, while statements made by witnesses during the police investigation, except for certain limited purposes, have been entirely excluded, the statements of the accused, provided they do not amount to a confession, are still admissible in law.³⁵ The words "nor shall any such statement" in S. 162(1) mean and refer to a statement made by any person to a Police-officer and in the course of an investigation under Ch. XIV. The words "if reduced into writing" only apply to the words "be signed by the person making it", and the use of an oral statement is, therefore, equally prohibited along with that of a written statement ; except that in the case of the latter it may be used in the restricted manner laid down by the Section.³⁶ The latter statement, even if admitted to contradict, cannot be used to corroborate the evidence of that person or to meet a suggestion of the defence. It is illegal for a Public Prosecutor to ask a defence witness what he stated to the Police during the investigation or to ask the Investigating Officer about anything said to him by the defence witnesses and to use his answer to contradict what the defence witnesses state in Court. It is also illegal to question prosecution witnesses as to what they

33. Badri (1925) 6 P. L. J. 620 : 27 Cr. L. J. 362 : A. I. R. 1926 P. 20 : 92 I. C. 874 ; Ponnusami (1933) 56 M. 475 : 34 Cr. L. J. 582 : A. I. R. 1933 M. 372 : 143 I. C. 424 [*Contra*, Iltaf Khan (1925) 5 P. 346 : 27 Cr. L. J. 796 : A. I. R. 1926 P. 362 : 95 I. C. 396]. See also Bahadur (1926) 7 L. 264 : 27 Cr. L. J. 803 : A. I. R. 1926 L. 367 : 95 I. C. 467 ; and notes under the Heading "*Such statements, if duly proved etc.*", *post*.

34. Bhagirathi (1925) 30 C. W. N. 142 : 27 Cr. L. J. 222 : A. I. R. 1926 C. 550 : 92 I. C. 174.

35. Jagwa (1925) 5 P. 63 : 27 Cr. L. J. 484 : A. I. R. 1926 P. 232 : 93 I. C. 884. See also Hussainbibi (1925) 20 S. L. R. 74 : 27 Cr. L. J. 456 : A. I. R. 1926 S. 151 : 93 I. C. 248 (It proceeded on the ground that 'accused' is not included within the words 'any person') ; Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227.

36. Nga Tha Din (1925) 4 R. 72 (F. B.) : 27 Cr. L. J. 881 : A. I. R. 1926 R. 116 : 96 I. C. 145.

stated before the Police without the procedure detailed in the proviso to S. 162 being carried out. It is also illegal to allow the Investigating Officer to give evidence that such and such a person during the investigation gave him the names of certain accused persons.³⁷ Even if the statement is recorded in the form of a memorandum of what the witness had said to the Police-officer, it is available for the purpose of contradicting the witness. It is not necessary, in order that an accused person may be allowed under S. 162 to contradict the witness, that the statement must contain the very words used by the witness.³⁸ Standing by themselves, police proceedings are not substantive evidence in the case and cannot be used in order to test the correctness of the statements made by witnesses on oath before the Court. Under S. 162, the entries made in the police diaries can be used only for the limited purpose of contradicting the evidence of the witnesses for the prosecution and only when such entries have been duly proved.³⁹ Under the first para of S. 162 no witness may be asked what he said to the Police during the investigation, nor may any Police-officer be asked what a witness said during the investigation, nor may any bystander be questioned as to what he heard another person say to a Police-officer during the investigation; the second para, however, loosens the rigidity of the first para to some extent. In consequence of this paragraph, when a witness for the prosecution is being examined, if an accused has reason to believe that the statement which the witness is making in Court differs from the statement which he made to the Police, then the accused or his advocate may ask the Court to refer to the record of any statement made by the witness to the Police and if it be found that there is any variation between the two statements, the defence are entitled to a copy of the record of the statement made to the Police. That copy may then be proved and the witness may be cross-examined on that statement under S. 145 of the Evidence Act and his attention must be drawn to the particular points in which his statement in Court differs from the record of his statement to the Police.⁴⁰ If the witness admits to have made the previous statement, the writing need not be proved; if he denies to have made any such statement, and it is intended to contradict him, the relevant portions of the record, contrary to the statement in Court, must be read to him and the witness should be given the opportunity to reconcile the same. It is only after this is done that the record of the previous statement becomes admissible in evidence for the purpose of contradicting the witness and can then be proved in any manner provided by law.⁴¹ Only those portions of the statements which have been actually used under S. 162 to contradict the witnesses in the manner provided for in S. 145 of the Evidence Act in the course of their cross-

37. Bahadur (1926) 7 L. 264 : 27 Cr. L. J. 803 : A. I. R. 1926 L. 367 : 95 I. C. 467.

38. Mafizaddi (1927) 31 C. W. N. 940 : 45 C. L. J. 561 : 28 Cr. L. J. 805 : A. I. R. 1927 C. 644 : 104 I. C. 245 ; Najibuddin (1933) 14 P. L. T. 543 : 35 Cr. L. J. 379 : A. I. R. 1933 P. 589 : 147 I. C. 142.

39. Ram Rang (1928) 29 Cr. L. J. 493 : A. I. R. 1928 L. 820 : 109 I. C. 22 ; Ibrahim (1927) 8 L. 605 : 28 Cr. L. J. 983 : A. I. R. 1928 L. 17 : 105 I. C. 807 ; Najibuddin (1933) 14 P.

L. T. 543 : 35 Cr. L. J. 379 : A. I. R. 1933 P. 589 : 147 I. C. 142.

40. Bana Singh (1927) 6 R. 137 : 29 Cr. L. J. 701 : A. I. R. 1928 R. 150 : 110 I. C. 333. This case has been dissented from in the subsequent case Nga U Khine (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66.

41. Gopi Chand (1930) 11 L. 460 : 31 Cr. L. J. 1071 : A. I. R. 1930 L. 491 : 126 I. C. 573 ; Mohinder Singh (1931) 33 Cr. L. J. 97 : A. I. R. 1932 L. 103 : 135 I. C. 209.

examination or in re-examination are parts of the judicial record and can be treated as evidence in the case. The other parts of those statements cannot be relied upon by the prosecution or the defence in determining the guilt or innocence of the accused.⁴² The prosecution cannot invoke the aid of S. 162. The defence, however, can use the statement for the purpose of contradiction and for showing that the witnesses have made different statements at different times. If, however, it is desired to clinch the matter before the Sessions Judge and the Jury and show in an affirmative manner that the witnesses for the prosecution cannot be relied on, it is the duty of the defence to prove through the Investigating Officer the record of the statements made to the Police during the stage of investigation.⁴³ When the prosecution was allowed to cross-examine two witnesses declared hostile, and in the course of the cross-examination, with a view to contradict them, they were asked whether they had made certain statements to the Investigating Police-officer : *Held*, that it was wrong to allow the witnesses' statements to the Police to be brought out and placed before the Jury by the prosecution ; and a retrial was ordered.⁴⁴ There has been a later decision to the contrary, but it does not appear that in that case the decision last mentioned was cited.⁴⁵

The plain meaning of the language of the Section is that a statement made by a person to a Police-officer in the course of the investigation, whether oral or reduced to writing, can not be used for any purpose, save at the request of the accused or his pleader. On the request of the accused the Judge or Magistrate must refer to the statement to see whether any part of the statement ought to be excluded under the second proviso to the Section and not for the purpose of deciding whether there is in the statement material for cross-examination of the witness in the manner provided by S. 145, Evidence Act.⁴⁶

To believe a witness because a perusal of the police diaries shows that he was examined at the earliest opportunity and had made the same statement is to make an improper use of the diaries.⁴⁷ A Court is not justified in admitting such statements unless the accused or his advocate asks the Court to refer to such record.⁴⁸ [*See Notes under Heading "Improper admission of evidence in contravention of S. 162," post"*]

Two over-riding considerations have to be noticed in connection with S. 162 (2) Cr. P.C. 1st, that the Section does not affect any statement as to the cause of death under S. 32 (1) of the Evidence Act ; and 2nd, that the Section is dealing with 'statement' and not with conduct

42. *Musst. Sabhai* (1929) 31 Cr. L.J. 199 : A. I. R. 1930 L. 449 : 121 I. C. 66.

43. *Jasimuddin* (1930) 35 C. W. N. 164 : 32 Cr. L. J. 1245 : A. I. R. 1931 C. 622 : 134 I. C. 763.

44. *Gahur* (1925) 30 C. W. N. 503 : 27 Cr. L. J. 641 : A. I. R. 1926 C. 793 : 94 I. C. 593 ; *Sachchidanand* (1933) 14 P. L. T. 580 : 34 Cr. L. J. 892 : A. I. R. 1933 P. 488 : 144 I. C. 936.

45. *Delbar* (1936) 40 C. W. N. 733.

46. *Nga U Khine* (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66 (dissenting from *Bana Singh* (1927) 6 R. 137 : 29 Cr. L. J. 701 : A. I. R. 1928 R. 150 : 110 I. C. 333).

47. *Fazal* (1926) 27 Cr. L. J. 614 : A. I. R. 1926 L. 363 : 94 I. C. 358.

48. *Nga Po Chon* (1926) 4 R. 356 : 27 Cr. L. J. 1371 : A. I. R. 1927 R. 80 : 98 I. C. 491.

in the sense of S. 8 of the Evidence Act but with mere statements⁴⁹ The proviso to S. 162 applies only to the statements made by persons who are called as witnesses for the prosecution; it does not apply to statements made by a person summoned by the Court at the instance of the defence.⁵⁰

Again, S. 162 says that the statements shall not be used at an inquiry or trial in respect of any offence which was under investigation at the time when such statements were made, but it does not prohibit the use of such statements in proceedings under S 476 of the Code, in cases where the alleged offence which is under consideration in the proceedings under that Section was not under investigation at the time when the statements were made.⁵¹

Where a witness was tendered by the prosecution and was discharged without being examined or cross-examined, the defence is not entitled to a copy of the statement made by the witness to the Police.⁵²

Whether the record of a statement be proved and used under S. 162 Cr. P. C., or used under S. 172 (2) Cr. P. C., without being proved, it is necessary for the Court to be astute to avoid using it otherwise than as provided by law.⁵³

An accused person, when being examined by the Court under S. 342 Cr. P. C. for the purpose of explaining anything in evidence against him, cannot be confronted with the statement which he had made to the Police for the purpose of being discredited on account of any contradiction.⁵⁴

To justify exclusion under the proviso, one of two conditions should be satisfied: Either (1) that it is irrelevant or (2) that its disclosure to the accused is both unessential in the interests of justice and inexpedient in the public interest. The two circumstances mentioned in the second condition must exist in conjunction. If the Judge excludes any part of the statement, he must record his opinion on which he bases the exclusion but not his reasons for that opinion.⁵⁵

The Madras High Court at first took a contrary view. Thus, it was held that the amendment of S. 162 is designed merely to confer on an accused person a legal right, which

49. Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227. See also Tota Meah (1929) 56 C. 1106 : 30 Cr. L. J. 1015 : A. I. R. 1929 C. 298 : 119 I. C. 139.

50. Gurditta (1927) 28 Cr. L. J. 828 : A. I. R. 1927 L. 713 : 104 I. C. 444 ; Ganga (1929) 4 Luck 726 : 3 Cr. L. J. 689 : A. I. R. 1930 O. 60 : 124 I. C. 444.

51. U Htin Gyan (1926) 5 R. 26 : 28 Cr. L. J. 433 : A. I. R. 1927 R. 113 : 101 I. C. 465. See also Jojesh v. Surendra (1931) 35

C. W. N. 838 : 33 Cr. L. J. 60 : A. I. R. 1931 C. 637 : 134 I. C. 1265.

52. Wajid Ali (1927) 7 P. 153 : 30 Cr. L. J. 273 : A. I. R. 1929 P. 34 : 114 I. C. 220.

53. Najibuddin (1933) 14 P. L. T. 543 : 35 Cr. L. J. 379 : A. I. R. 1933 P. 589 : 147 I. C. 142.

54. Bhagwan (1934) 1935 A. L. J. 385 : 36 Cr. L. J. 773 : A. I. R. 1935 A. 717 : 155 I. C. 560.

55. Nga U Khine (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66.

the old Section did not give, of having a copy of the written record for the purpose of using it to contradict a witness ; otherwise the law is unaltered ; and all oral statements, which were previously admissible under the Evidence Act, are still admissible and S. 162 is no bar to the admissibility of such oral statements for purposes allowed by the Evidence Act ; but such oral statements made to the Police during the Police Investigation can be used only to corroborate a witness if he is examined at the trial and not as substantive evidence ; the expression "such statement" in Sub-S. (1) of S. 162, refers to written, not oral, statements—'such' means 'if reduced to writing' and does not include statements not reduced to writing.⁵⁶ This case has now been over-ruled by a Full Bench which has held that the words "any such statement" in the first para of clause (1) cover not only written statements but also oral statements.⁵⁷ The provisions of S. 162 do not prevent the prosecution, after a witness has made a statement, asking him simply whether he made that statement to the Police, or when a witness has made a statement in his evidence, from asking the Sub-Inspector whether, in fact, the witness had made that statement to him ; in asking such a question there is no use of the statement recorded by the Police during their investigation, the witness or the Sub-Inspector is merely asked a question as to a certain fact.⁵⁸

Under S. 162 no oral statement made by a witness to the Police in the course of an investigation under Ch. XIV and no record of such statement shall be used for any purpose at an inquiry or trial in respect of the offence under investigation, except as provided in that Section. The prosecution, therefore, cannot ask a prosecution witness what statement he made to the Police. There is, however, nothing to prevent the question being put whether the witness made any statement to the Police or whether he was questioned by the Police.⁵⁹

The Statement before the Police, if reduced into writing, shall not be signed by the person making it.—

S. 162 Cr. P. C., has been enacted for the benefit of the accused. It is intended that statements to the Police in the course of an investigation should not be used in evidence against the accused though the accused is allowed to make use of them in his favour within the limits of the proviso to that Section. The policy underlying the rule contained in the Section seems to be that the witnesses at the trial should be free to make any statements in favour of the accused, which they should wish to make, unhampered by anything which they might have said or might have been made to say to the Police. The result of witnesses'

56. In re Venkatasubbiah (1924) 48 M. 640 : 26 Cr. L. J. 721 : A. I. R. 1925 M. 579 : 86 I. C. 209 [not approved in Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227 ; over-ruled by Chinna Thimmappa (1928) 51 M. 967 (F. B.) : 29 Cr. L. J. 1098 : A. I. R. 1928 M. 1028 : 112 I. C. 682]
 57. Chinna Thimmappa (1928) 51 M. 967 (F. B.) : 29 Cr. L. J. 1098 : A. I. R. 1928 M. 1028 :

112 I. C. 682. See also Hari (1934) 28 S. L. R. 397 : 36 Cr. L. J. 1161 : A. I. R. 1935 S. 145 : 157 I. C. 697.
 58. Guhi Mian (1924) 4 P. 204 : 27 Cr. L. J. 524 : A. I. R. 1925 P. 450 : 93 I. C. 988. [But see Badri (1925) 27 Cr. L. J. 362 : A. I. R. 1926 P. 20 : 92 I. C. 874]
 59. Mohan Banjari (1933) 30 N. L. R. 55 : 35 Cr. L. J. 577 : A. I. R. 1933 N. 384 : 147 I. C. 1122.

signatures having been obtained on their statements reduced into writing would be to tie them down to the statements so recorded, or at any rate to give them the impression that they were not free to make a different statement. Where, therefore, the Police-officer takes such signatures in contravention of S. 162, and the documents purport to record statements which practically cover the whole of the prosecution evidence, the evidence of such witnesses must be rejected. It is not a mere irregularity which can be cured by S. 537, but a clear illegality, being a direct breach of a mandatory provision of law.⁶⁰ This view has not been accepted and it has been held that such a signed statement should not be *ipso facto* rejected; it is only an irregularity and would not, by itself, be a ground sufficient for quashing a conviction.⁶¹

Or any record thereof in a police diary or otherwise.—

S. 172 does not deal with the recording of any statement by witnesses. What is intended to be recorded under S. 172 is what the Sub-Inspector did—the places where he went, the people he visited, what he saw &c. No statement can be recorded under this Section which would be a privileged one. There is no distinction now between a statement recorded under S. 162 and a statement recorded under S. 172. It is immaterial whether the statement as recorded is the actual record of the words used by the witness. It is sufficient, even if the statement is recorded in the form of a memorandum of what the witness had said to the Police-officer.

It is available for contradicting the witness. It is not necessary for the purpose of contradiction under S. 162 that the statement must contain the very words used by the witness.⁶² The statements of witnesses referred to in S. 162 should not be entered in the special diary which should merely record the steps taken by the Police-officer in the investigation.⁶³

The accused has no right to insist upon a police witness referring to his diary in order to elicit information which is privileged; the contents of the diary are not at the disposal of the defence and cannot be used except strictly in accordance with the provisions of S. 162 and S. 172 of the Code.⁶⁴

Such statement, if duly proved, may be used to contradict such witness in the manner provided by S. 145 of the Evidence Act.—

The wording in the Section prior to its amendment in 1923 was "such statement may be used to impeach the credit of such witness in manner provided by the Indian Evidence Act." The amendment of 1923 substituted the above words in the heading. The object

60. Bhuneshwari (1931) 8 O. W. N. 503 : 32 Cr. L. J. 860 : A. I. R. 1931 O. 172 : 132 I. C. 234.

61. Muhammad Panah (1934) 35 Cr. L. J. 1170 : A. I. R. 1934 S. 78 : 153 I. C. 917.

62. Mafizaddi (1927) 31 C. W. N. 940 : 45 C. L. J. 51 : 28 Cr. L. J. 805 : A. I. R. 1927 C. 644 : 104 I. C. 245. See also Hamidkhan (1932) 28 N. L. R. 291 : 34 Cr. L. J. 127 :

A. I. R. 1933 N. 4 : 140 I. C. 825. Najibuddin (1933) 14 P. L. J. 543 : 34 Cr. L. J. 379 : A. I. R. 1933 P. 589 : 147 I. C. 142.

63. Hafiz Muhammad (1931) 12 P. L. J. 393 : 32 Cr. L. J. 638 : A. I. R. 1931 P. 150 : 131 I. C. 17.

64. Mohinder (1931) 33 Cr. L. J. 97 : A. I. R. 1932 L. 103 : 135 I. C. 269 ; Jagannath (1934) A. I. R. 1935 N. 23.

remains the same, viz, to impeach the credit of the witness. But the change has been made by specifically mentioning S. 145, because the previous *oral* statements of the witness before the Police can no longer be used for the purpose of contradicting, or impeaching the credit of the witness. S. 155 (3) of the Evidence Act authorised the use of oral as well as written statements previously made for the purpose. S. 162 of the Code authorises now only the use of written statements for the said purpose; and to impeach the credit of a witness by proof of former inconsistent written statements, the procedure mentioned in S. 145 of the Evidence Act must be followed. Hence S. 145 has been specifically mentioned. That Section says :—

“A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

According S. 145, therefore, if it is intended to contradict the witness by his previous statement reduced into writing by the Police-officer, the attention of the witness must first be called to those parts of such statement which are to be used for the purpose of contradicting him. If the witness admits that he made the statement actually recorded by the Police, the record of the statement need not be proved and the cross-examiner may, if he so chooses, leave it to the party who called the witness to have the discrepancy, if any, explained in the course of re-examination. If, on the other hand, the witness denies having made such a statement, or states that he does not remember having made it, and it is desired to contradict him by the record of the previous statement, the cross-examiner must put to the witness the relevant portions of the record which are contrary to his statement in Court and thus give him an opportunity to reconcile the same. Then the previous statements become admissible for the purpose of contradiction and may be proved.⁶⁵ But it has also been held that the procedure under S. 162 applies not only where it is desired to contradict the evidence of the witnesses by the statements but also where the evidence of the witnesses agrees with the statements. The language of S. 162 is meant to be comprehensive and it covers all cases of any use of the statements to the Investigating Officer except as excepted by the Cr. P. C. When a witness is called and the statement to the Police is made the subject of cross-examination, then the Court should make a reference to that written statement and make a note of what the written statement actually says. Proof by general reference to them by the Investigating Officer is not sufficient.⁶⁶ A witness should be informed of the part of his statement which is to be used to contradict him and he should be given an opportunity of explaining what he meant by that portion of his statement. Where, therefore, a long statement under S. 162, was given to the witness

65. Mohinder (1931) 33 Cr. L. J. 97 : A. I. R. 1932 L. 103 : 135 I. C. 209; Gopi Chand (1930) 11 L. 460 : 31 Cr. L. J. 1071 : A. I. R. 1930 L. 491 : 126 I. C. 573. [See Cases noted under Heading “The law as it at present stands”, ante.] But see Ahmad (1927) 29 Cr. L. J. 14 : A. I. R. 1928 L. 144 : 106 I. C. 350.

See also Sadhu Shaikh (1927) 32 C. W. N. 280 : 29 Cr. L. J. 31 : A. I. R. 1928 C. 260 : 109 I. C. 355. In re Kallam Narayana (1932) 56 M. 231 : 64 M. L. J. 88 : 34 Cr. L. J. 481 : A. I. R. 1933 M. 233 : 143 I. C. 46.
66. Sheo Dayal (1933) 55 A. 689 : 35 Cr. L. J. 360 : A. I. R. 1933 A. 535 : 147 I. C. 15.

who was asked whether that was his statement to the Police and the witness replied in the affirmative, it cannot be regarded as a sufficient compliance with the provision of S. 145 of the Evidence Act.⁶⁷

When a witness makes certain statements in the Sessions Court which he has not made before the Investigating Police-officer, the method of contradicting the witness by the omission in his statement to the Police-officer is different in Patna and Bengal from that in Lahore and the United Provinces. In Lahore the practice is for the accused to mark the passages in the copy from the diaries given to him and then to ask the writer of the statement to say that it is a true copy. In Patna, on the other hand, the practice is different. The attention of the prosecuting witness is drawn to the contradictory statements made by him before the Police, and the Investigating Officer is asked whether the witness did or did not make the particular statement before him. The answer given by the Police-officer (which is always checked with reference to what is written in the diaries) is considered quite sufficient to contradict the witness and neither the original record of that statement in the police diary nor the copy of it furnished to the accused is ever proved or admitted in evidence. Though the Lahore practice is not necessarily incorrect, the practice prevailing in Patna is correct and has not been affected by the amendment of the Code in 1923.⁶⁸

There is, however, some conflict of decisions on the point as to whether a witness can be contradicted, not by a statement previously made to the Police, but by the omission to make that statement, which he makes at the trial, before the Police. From the decision in the case of *E. v. Vithu Balu* (A. I. R. (1924) B. 510) it appears that such omitted statement can be relied upon by the accused for contradicting the prosecution witness. In *Badrī v. K. E.* (A. I. R. (1926) P. 20) it has been held that it is not permissible to use the recorded statement as a whole to show that the witness did not say something to the Investigating Officer, while in *Itaf Khan v. E.* (A. I. R. (1926) P. 362) it has been held that if the contradiction consists in this that a statement made at the trial was not made in any part of the statement to the Police, S. 162 does not debar such a contradiction to be proved. See also *Kashiram v. E.* (A. I. R. (1928) A. 280) and *Behari Mahton v. E.* (A. I. R. (1931) P. 152), *ante*. The Madras High Court has followed the case of *Badrī v. K. E.* in A. I. R. (1926) P. 20 and held that a statement to the Police cannot be used during a trial or inquiry in order to show that while giving evidence the witness has made assertions which he did not make when he was examined by the Police; the statement may be used in the manner laid down by S. 145 of the Evidence Act, only to show that the witness is contradicting something he had said before (*In re Pounusami*, 56 M. 475 : A. I. R. (1933) M. 372 : 34 Cr. L. J. 582.) Of course, it is not necessary for the purpose of contradiction under S. 162 that the statement must contain the very words used by the witness (*Mafizuddi v. E.* (1927) 31 C. W. N. 940); but the value of a mere gist note of what the witness stated before the Police for the purpose of contradicting testimony given on oath at a subsequent trial varies in each case when

67. *Raghuraj* (1934) 36 Cr. L. J. 188 : A. I. R. 1934 A. 956 : 152 I. C. 873.

68. *Bihari Mahton* (1930) 10 P. 107 : 52 Cr. L. J. 797 : A. I. R. 1931 P. 152 : 131 I. C. 801.

the only record is a brief note ; omissions from that note are of practically no value to prove that the witness did not state to the Officer matters to which he deposes at the trial (*E. v. Najibuddin* A. I. R. (1933) P. 589 : 14 Pat. L. T. 543).

The words "*if duly proved*" clearly show that the record of the statement cannot be admitted in evidence straight away but that the Officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement relied upon by the accused for contradicting the witness, and S. 67 of the Evidence Act applies to this case.⁶⁹ If the Officer be dead, the entries of such statements made by him in his diary are admissible under S. 32 (2) of the Evidence Act, being entries made in the discharge of professional duties, and S. 162 Cr. P. C. does not prohibit their use.⁷⁰ When part of a statement is used in cross-examination to contradict the witness, it must be proved and brought on the record. Proof may be by the admission of the witness that he made the statement or by the examination of the Police-officer who recorded it. If the latter course is to be adopted, in order to avoid delay, there can be no objection to allowing cross-examination subject to the subsequent proof of the statement.⁷¹ When the defence had obtained a copy of a statement of a prosecution witness which was in their support, but they did not question that witness or any other on the point during the trial and the accused was declared guilty by the Jury: *Held*, that the statement cannot be made use of by the defence for invoking the High Court's power of revision to interfere with the verdict of Jury.⁷²

What does not amount to a statement to the Police within the meaning of S. 162.—

For the application of S. 162, there must be a statement which is capable of being recorded and reduced into writing ; and, therefore, if a witness said, "I did not make any statement to the Police," it cannot be a statement under S. 162. The same view was taken in the unreported case of *E. v. Nagendra* (Ref. No. 5 and Appeal No. 510 of 1925) decided on the 8th October 1925, in which it was said—"A question was put to one of the defence witnesses as to whether he had made a certain statement to the Police when he was examined under S. 161 Cr. P. C. It is contended that, having regard to the provisions of S. 162, the statement made to the Police-officer under S. 161 could not be used for any purpose. But all that was put to the witness was whether he had made such a statement to the Police, and his answer was that he did not remember. It is not proved that the statement was actually made to the Police, and the mere fact that a question was put to the witness asking him whether he had made a particular statement to the Police did not vitiate the trial as it is not proved that such a statement was actually made to the Police under S. 161 of the Cr. P. C." It is, however, doubtful

69. Vithu Balu (1924) 26 Bom. L. R. 965 : 26 Cr. L. J. 223 : A. I. R. 1924 B. 510 : 83 I. C. 1007 ; Jasimuddin (1930) 35 C. W. N. 164 : 32 Cr. L. J. 1245 : A. I. R. 1931 C. 622 134 I. C. 763.
70. Abdul Aziz (1931) 1932 A. L. J. 301 : 34 Cr.

L. J. 109 : A. I. R. 1932 A. 442 : 140 I. C. 578.

71. Nga U Khine (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66.

72. Hari Mahto (1935) 37 Cr. L. J. 320 : A. I. R. 1936 P. 46 : 160 I. C. 675.

if a statement by a witness to the Police under S. 161 that he knew nothing about the occurrence is not a statement within the meaning of S. 161 Cr. P. C.⁷³

Where police diaries were called for by the defence and it was found that what was recorded was a joint statement by the prosecution witnesses and other persons, and no separate record had been made of what was sought to be contradicted; *held*, that the Court should not allow the defence to use the statement, as such a joint statement does not come within the ambit of S. 162 Cr. P. C. If the joint statement means that more than one statement is contained in one document or that a number of statements have been recorded *seriatim*, then the defence may be allowed to see and use the statements of the particular witness although it is included in a record along with the statements of other persons. If, on the other hand, it means that a story told by a number of witnesses has been boiled down by the Police-officer into a statement of his own then the defence should not be allowed to use such a statement.⁷⁴

S. 162, as amended, has no application to *statements of accused* persons who are on their trial; both the context of S. 162 and its contents point to the same direction. "Any person" means "*quivis expopulo*." It is unreasonable in view of the special law applicable to the statements of accused persons to the Police to refuse to apply the well-established rule "*generalia specialibus non derogant*." A contrary view involves an implied but complete repeal of S. 27 of the Evidence Act.⁷⁵ In this case Rankin, J. observed thus: "Statements made by an accused belong to a class which the Evidence Act calls 'admissions' (Ss. 17, 18) and *prima facie* they are evidence against the maker but not in his favour. 'Confessions' are a sub-species of 'statements' and a species of 'admissions.' Ss. 24, 25 and 26 of the Evidence Act provide that in criminal cases confessions are irrelevant if they are induced by threat or promise, and are inadmissible against the accused if made to a Police-officer, or if made while the accused is in custody (unless made in the presence of a Magistrate). As S. 162 Cr. P. C. is only concerned with statements made to a Police-officer, I need only observe here that, broadly speaking, a statement made by an accused to a Police-officer may be proved against him under the Evidence Act if it is not a confession and even if it is a part of a confession,

73. Aseruddin (1926) 53 C. 980 : 28 Cr. L. J. 273 : A. I. R. 1927 C. 257 : 100 I. C. 353. See Iltaf Khan (1925) 5 P. 346 : 27 Cr. L. J. 796 : A. I. R. 1926 P. 362 : 15 I. C. 396.

74. Karimuddi (1931) 36 C. W. N. 106 : 33 Cr. L. J. 725 : A. I. R. 1932 C. 375 : 139 I. C. 245.

75. Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227 [following Nga Tha [Din (1925) 4 R. 72 (F. B.) : 27 Cr. L. J. 881 : A. I. R. 1926 R. 116 : 96 I. C. 145 ; Rannun (1926) 7 L. 84 : 27 Cr. L. J. 709 : A. I. R. 1926 L. 88 : 94

I. C. 901 ; Jagwa Dhanuk (1925) 5 P. 63 : 27 Cr. L. J. 484 : A. I. R. 1926 P. 232 : 93 I. C. 884 ; all noted under Heading "S. 162 and S. 27 Evidence Act", *post* ; and Jadub Das (1899) 27 C. 295 : 4 C. W. N. 129]. See also Sheobalak (1927) 11 N. L. J. 7 : 29 Cr. L. J. 400 : A. I. R. 1928 N. 108 : 108 I. C. 442 ; Ganpati (1910) 6 N. L. R. 180 : 12 Cr. L. J. 60 : 8 I. C. 1181 ; Newaj Ali (1928) 33 C. W. N. 257 : 30 Cr. L. J. 916 : 118 I. C. 368 ; Faujdar (1933) 55 A 463 : 34 Cr. L. J. 875 : A. I. R. 1933 A. 440 : 144 I. C. 1021 ; Rego (1933) 29 N. L. R. 251 : 34 Cr. L. J. 505 : A. I. R. 1933 N. 136 : 143 I. C. 17.

it is admissible under S. 27 if a fact is deposed as discovered in consequence of the information. In my opinion, S. 162 Cr. P. C. does not disturb this position."

A statement made by the accused to the Police, immediately after they were seized, explaining the circumstance which brought them to the scene of crime, when at variance with that made before the Sessions Court, is admissible as showing that the conduct of the accused was not that of an innocent person.⁷⁶ But statements of an accused person made to the Police before his arrest come within the prohibition of S. 162 as amended.⁷⁷ Some High Courts, however, have held that the words "by any person" in S. 161 include the case where some of the accused have made statements to the Police in the course of the investigation, and consequently such statements are covered by S. 162.⁷⁸ So, the Bombay High Court has held that S. 162 is intended to prevent the user of statements made by the accused to the Police, and questions designed to show, by process of elimination, that matters subsequently mentioned by the accused were omitted from such statements are within the mischief aimed at by the Section.⁷⁹ And the Madras High Court has held that the words "any person" comprehend a person who subsequently becomes the accused and the words "any purpose" include purpose of prosecution or defence; so a statement made by the accused to a Police-officer in the course of his investigation immediately after the accused pointed out to the Police the place where the jewels worn by the murdered boy were hidden is not admissible in evidence, though it may materially assist the defence; though it is, of course, open to the accused to repeat that statement in Court and call witnesses to support that statement.⁸⁰ A Full Bench of the Madras High Court has now definitely held that the expression "statement by any person" includes a statement made by a person accused of the offence under investigation.⁸¹

As to the statements of an *approver* to the Police before he was tendered a pardon, the Lahore High Court has held that they are covered by S. 162, but even if they are not so covered, it would be a previous statement of a witness and could be used either to corroborate him or to contradict him under the ordinary provisions of the Indian Evidence Act.⁸² The

76. Chuto (1931) 25 S. L. R. 391 : 33 Cr. L. J. 302 : A. I. R. 1932 S. 16 : 136 I. C. 523.

77. Sheosatyanarayan Iall (1925) 8 N. L. J. 217 : 27 Cr. L. J. 161 : A. I. R. 1926 N. 1 : 91 I. C. 945 [holding obsolete Buddhu (1906) 3 N. L. R. 51 : 5 Cr. L. J. 434 ; Ganpati (1910) 6 N. L. R. 180 : 12 Cr. L. J. 60 : 8 I. C. 1181].

78. Manmohan (1929) 9 P. 577 : 31 Cr. L. J. 1123 : A. I. R. 1930 P. 510 : 126 I. C. 851 ; Hazara Singh (1927) 9 L. 389 : 29 Cr. L. J. 348 : A. I. R. 1928 L. 257 : 108 I. C. 167 (*See post*) ; Asa Singh (1933) 35 Cr. L. J. 517 : A. I. R. 1934 L. 102 : 147 I. C. 935 [*but see* Rannun (1926) 7 L. 84 : 27 Cr. L. J. 709 : A. I. R. 1926 L. 88 : 94 I. C. 901] ;

Issuf Mahomed (1930) 55 B. 435 : 32 Cr. L. J. 1077 : A. I. R. 1931 B. 311 : 133 I. C. 748 ; Sheikh Kalesha (1931) 1931 M. W. N. 715 : 33 Cr. L. J. 132 : A. I. R. 1931 M. 779 : 135 I. C. 364.

79. Issuf Mahomed (1930) 55 B. 435 : 32 Cr. L. J. 1077 : A. I. R. 1931 B. 311 : 133 I. C. 748.

80. Sheikh Kalesha (1931) 1931 M. W. N. 715 : 33 Cr. L. J. 132 : A. I. R. 1931 M. 779 : 135 I. C. 364.

81. *In re Syamo* (1932) 55 M. 903 (F. B.) : 33 Cr. L. J. 413 : A. I. R. 1932 M. 391 : 137 I. C. 9.

82. Hazara Singh (1927) 9 L. 389 : 29 Cr. L. J. 348 : A. I. R. 1928 L. 257 : 108 I. C. 167.

Patna High Court has held that S. 162 is not confined to statements taken by reason of the powers given to the Police under S. 160 ; the words "by any person" in S. 161 include the case when some of the accused have made statements to the Police in the course of the investigation. When the makers of such statements are made approvers and called for the prosecution, the other accused are entitled to copies of the statements.⁸³ When the Sessions Judge tried to explain the discrepancies between the statements of the approver and other witnesses by reference to the statement of the approver made before the Police : *Held*, that, the procedure was opposed to the express terms of S. 162.⁸⁴

Statements of Police-officers who give evidence with regard to the *identification parades* which were held in the case and who depose to certain of the accused having been identified by the relevant prosecution witnesses, are not inadmissible under S. 162, for the Police-officers do not depose to a statement made to the Police but, on the contrary, depose to an actual fact or circumstance seen and observed by themselves.⁸⁵ But the statement made by the complainant to the Investigating Officer to the effect that the accused was the person who had attempted to rob her is inadmissible in evidence.⁸⁶

A Police-officer in charge of an investigation is not debarred from making *explanatory remarks in reference to his own conduct* even though it may inferentially have reference to the statements made by witnesses ; and their admissibility in evidence is not to be questioned.⁸⁷ S. 162 does not prevent a Police-officer from explaining his conduct in sending up a particular set of accused persons for trial by making a statement that he had received no information to such effect ;⁸⁸ nor from explaining his conduct by making such a statement as this, "at the time I did so and so, I had received no information to such and such effect."⁸⁹

A list of ornaments handed over to the Investigating Police-officer during the course of the investigation alleged to be stolen during the dacoity, is a statement within the meaning of S. 162 and therefore inadmissible.⁹⁰ But a list prepared before the actual investigation began is not a statement made to a Police-officer during the course of the investigation ; such a list may be regarded as an addition to the First Information Report and S. 162 has no application.⁹¹ A list of stolen things given to supplement the First Information Report is admissible and can be referred to under S. 158 and proved under S. 159, Evidence Act. The fact that

83. Manmohan (1929) 9 P. 577 : 31 Cr. L. J. 1123 : A. I. R. 1930 P. 510 : 126 I. C. 851.

84. Asa Singh (1933) 35 Cr. L. J. 517 : A. I. R. 1934 L. 102 : 147 I. C. 935.

85. Ramadhin (1928) 29 Cr. L. J. 963 : A. I. R. 1929 N. 36 : 112 I. C. 51.

86. Krishna (1935) 62 C. 918 : 39 C. W. N. 488 : 36 Cr. L. J. 1470 : A. I. R. 1935 C. 311 : 158 I. C. 843.

87. Tota Meah (1929) 56 C. 1106 : 30 Cr. L. J. 1015 : A. I. R. 1929 C. 298 : 119 I. C. 139.

88. Basant Singh (1930) 31 Cr. L. J. 442 : A. I. R.

1930 L. 484 : 122 I. C. 568 [relying on Tota Meah (1929) 56 C. 1106 : 30 Cr. L. J. 1015 : A. I. R. 1929 C. 298 : 119 I. C. 139].

89. Mohan Lal (1931) 32 Cr. L. J. 682 : A. I. R. 1931 L. 177 : 131 I. C. 276.

90. Fulbash Sheikh (1919) 31 Cr. L. J. 127 : A. I. R. 1929 C. 448 : 120 I. C. 458 ; Sucha Singh (1932) 34 Cr. L. J. 379 : A. I. R. 1932 L. 488 : 142 I. C. 699.

91. Autar (1930) 7 O. W. N. 456 : 31 Cr. L. J. 1017 : A. I. R. 1931 O. 74 : 126 I. C. 498 ; Narain (1930) 8 O. W. N. 31 : 32 Cr. L. J. 630 : A. I. R. 1931 O. 83 : 131 I. C. 72.

a copy of the list had been given to the Police would not affect the admissibility of the informant's list.⁹²

In the course of an investigation into a case which was started on information lodged by the opposite party the latter made a statement before the Police-officer who recorded it. The same was sought to be used against the opposite party in a later proceeding against him for offences under Ss. 192, 193 and 211 I. P. C. *Held*, that it was evidence of *res gestae* and that it was not rendered inadmissible because of S. 162.⁹³ S. 162 says that the statement shall not be used at an inquiry or trial in respect of any offence which was under inquiry at the time when such statements were made, but it does not prohibit the use of such statements in proceedings under S. 476 Cr. P. C., in cases where the alleged offence under investigation in the proceeding under S. 476 was not under investigation at the time when the statement was made.⁹⁴ When the statement has not been made in the course of investigating the offence in respect of which the trial is held, neither the main part of S. 162 nor the proviso has any application. Thus, if in an investigation of theft A says to the Police that B and C beat him, that statement can be proved when D and E are being tried for assault, the trial in no way being in respect of the investigated theft, though of course if in any way the assault had been under investigation by the Police the statutory bar would apply.⁹⁵ Police closed their investigation, for the accused was not detected at the time. He was subsequently apprehended : *Held*, that although the case against the accused had been closed as undetectable, that was only for police purposes and the inquiry must be held to be still pending against him within the meaning of S. 162 and the statement of a witness to the Police must be deemed to be a statement taken from the witness in the course of that inquiry.⁹⁶

First Information Report against the accused is clearly not a statement within the contemplation of S. 162, because it is not made in the course of an investigation. Again, S. 154 requires it to be signed, whereas statements within S. 162 are forbidden to be signed even when recorded in writing. It is usually put in by the prosecution which, in any ordinary case, has a duty to put it in. But however important First Information Reports may be, they do not prove themselves and have to be tendered under one or other of the provisions of the Evidence Act. The usual course is for the prosecution to call the informant and for the First Information to be tendered as corroboration under S. 157 of the Evidence Act, but it could also be tendered in a proper case under S. 32(1) as a declaration as to the cause of the informant's death, or as part of the informant's conduct (of the *res gestae*) under S. 8. Theoretically, the defence could prove the information to impeach the informant's credit under S. 155 or to contradict him under S. 145. Counter-information, laid against a complainant or his party after the First Information against the accused, by a person of the accused's party who is himself not an accused, come under S. 154 Cr. P. C., and must be reduced to writing

92. *Amrit Lal* (1933) 35 Cr. L. J. 654 : A. I. R. 1933 L. 987 : 148 I. C. 40).

93. *Jogesh v. Surendra* (1931) 35 C. W. N. 838 : 33 Gr. L. J. 60 : A. I. R. 1931 C. 637 : 134 I. C. 1265.

94. *U. Htin Gyaw* (1926) 5 R. 26 : 28 Cr. L.

J. 433 : A. I. R. 1927 R. 113 : 101 I. C. 465.

95. *Subbaya v. Veerayya* (1933) 56 M. 154 : 1932 M. W. N. 1074 : 34 Cr. L. J. 137 : A. I. R. 1933 M. 65 : 141 I. C. 276.

96. *Karuppan* (1935) 1935 M. W. N. 820.

and signed, and therefore cannot come within S. 162. Whether such information is admissible at the trial of the accused must be decided under the Evidence Act. The Police cannot treat statements as information unless they are really received as such and come truly and properly within S.154.⁹⁷ Telegram sent to Police that an offence has been committed stands in no better position than village gossip ; but statement to Police, of a person who purported to send the telegram, on arrival of the Police there, is not one taken in the course of the police investigation within S. 162, and is therefore admissible in evidence.⁹⁸ The proposition that, because a person of the party of the accused goes first to the police station and says that some of the complainant's party has committed an offence, the real complaint lodged later on under S. 154 against the accused must be kept off the record save on terms under S. 162, is one which cannot be judicially approved.⁹⁹ Although an information under S. 154 may be recorded in the course of an investigation, the offence is not under investigation until the First Information is obtained. In such a case the prior statements made to the Police are not affected by S. 162. On a construction of a series of statements made to the Police : *Held*, that the last in point of time really constituted the 'first' information and that the earlier statements were not made inadmissible because of S. 162.¹⁰⁰ Where two different persons give at two different places a report about the commission of an offence and one of them is earlier in point of time, the latter one should not be excluded as a statement to a Police-officer under S. 161 Cr. P. C., as it is not a statement made to a Police-officer in the course of investigation but was an independent first Information Report. It can be used by the prosecution.¹⁰¹

Statements taken by a *Criminal Investigation Officer* in a preliminary inquiry conducted by him against a public officer before sanction for prosecution was given and before he was ordered by a Magistrate to investigate under S. 155 (2) Cr. P. C., are not statements falling within the purview of 162 of the Code. To all intents and purposes they are on a par with statements made in a departmental inquiry and the accused are not entitled to copies of such statements. Similarly, statements recorded by a Magistrate in such a preliminary inquiry at the instance of the Criminal Investigation Officer do not fall under the purview of S. 164 Cr. P. C.¹⁰² But it has recently been

97. Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227. See also Muhammad Ibrahim (1928) 30 Cr. L. J. 38 : A. I. R. 1929 N. 43 : 112 I. C. 902.

98. Chidambaram (1927) 55 M. L. J. 231 : 29 Cr. L. J. 717 : A. I. R. 1928 M. 791 : 110 I. C. 461 [referring to *In re Nandamuri* (1914) 15 Cr. L. J. 922 : 25 I. C. 630 and *Dargahi* (1924) 52 C. 499 : 26 Cr. L. J. 1213 : A. I. R. 1925 C. 831 : 88 I. C. 733.] This case has been dissented from in *Chanan Singh* (1934) 15 L. 814 : 36 Cr. L. J. 97 : A. I. R. 1934 L. 413 : 152 I. C. 229, which

has held that when the authenticity of the original telegram is confirmed it satisfies the requirements of S. 154.

99. Osman Gani (1929) 31 Cr. L. J. 771 : A. I. R. 1930 C. 130 : 125 I. C. 111.

100. Mani Mohan (1931) 58 C. 1312 : 35 C. W. N. 623 : 33 Cr. L. J. 138 : A. I. R. 1931 C. 745 : 135 I. C. 289.

101. Lalji Rai (1935) 16 P. L. T. 730 : 37 Cr. L. J. 235 : A. I. R. 1936 P. 11 : 160 I. C. 181.

102. Jehangir (1927) 29 Bom. L. R. 996 : 28 Cr. L. J. 1012 : A. I. R. 1927 B. 501 : 106 I. C. 100.

held by a Full Bench of the Chief Court of Sindh, that when the statement has not been made in the course of investigation in respect of an offence for which the trial was held, neither the main part of S. 162 nor the proviso has any application. Consequently, where the departmental inquiry is not held under Ch. XIV Cr. P. C., neither S. 162 nor S. 172 will apply and the accused has a right to see the statements made in such inquiry.¹⁰³

S. 162 does not exclude a statement before a Bombay Police-officer from being proved except in so far as it is inadmissible under the Bombay City Police Act.¹⁰⁴

S. 172 Cr. P. C. has no application to a diary prepared under S. 47A of the Calcutta Suburban Police Act III of 1888 and hence the accused will be entitled to inspect and use the statements recorded therein by Police-officers, of witnesses who have been examined in the case, to contradict the evidence given by these witnesses before the Magistrate under S. 145 of the Evidence Act.¹⁰⁵ In the Calcutta Police Act IV of 1866 there is no Section corresponding to Ss. 162 or 172 Cr. P. C. There is no mention in this Act of any confidential diary which is privileged and cannot be reached by a party in a criminal case. S. 78A of the Act is the only Section dealing with the power of the Sub-Inspector to record the statement of a person in connection with a criminal charge. When a statement recorded by the Sub-Inspector was not allowed to be proved by the defence, *held*, that the accused was prejudiced thereby and the trial was vitiated.¹⁰⁶

Where the Superintendent of Police held an investigation, in the course of which he recorded statements of several persons and as a result of his investigation, proceedings were started under S. 107 Cr. P. C., against the applicants who applied for copies of the statements: *Held*, that even assuming that the applicants were the 'accused' within the meaning of S. 162, Chapter VIII of the Code contained no provisions for a preliminary investigation, which must have been made under S. 51 (1) (b) of the Bombay District Police Act, IV of 1890, and S. 162 did not apply to the statement of witnesses recorded therein.¹⁰⁷ The Police investigating a case under the preventive Sections of the Code are not acting under S. 162 of the Code. Moreover, an inquiry before a Magistrate under Ch. VIII of the Code is not an inquiry into an 'offence', and therefore S. 162 cannot be used to shut out statements made to the Police by persons who are afterwards cited as witnesses.¹⁰⁸

A village-headman in Burmah cannot examine witnesses on oath, in the course of an inquiry in a criminal case, under S. 161 Cr. P. C. So the statement made to a headman can only be used in the manner provided for in Ss. 145 and 157 of the Evidence Act.¹⁰⁹

103. Muhammad Rahim (1934) 29 S. L. R. 92 (F.B.)
36 Cr. L. J. 581 : A. I. R. 1935 S. 13 : 154
I. C. 762.

104. Wahiduddin (1929) 54 B. 528 : 31 Cr. L. J.
1003 : A. I. R. 1930 B. 158 : 126 I. C. 333.

105. Suresh (1923) 24 Cr. L. J. 757 : 74 I. C.
261 (C).

106. Panchanan (1928) 33 C. W. N. 203 : 30 Cr.
L. J. 577 : A. I. R. 1929 C. 257 : 116 I. C. 160.

107. In re Barjorji (1931) 34 Bom. L. R. 258 : 33 Cr.
L. J. 797 : A. I. R. 1932 B. 196 : 139 I. C.
628.

108. In re Hari Singh (1933) 56 M. 987 : 34 Cr. L. J.
951 : A. I. R. 1933 M. 688 : 145 I. C. 379.

109. Mi Choke (1933) 34 Cr. L. J. 781 : A. I. R.
1933 R. 119 : 144 I. C. 369.

When a girl has been kidnapped from Moradabad district and found in Delhi and the Sub-Inspector of Delhi records the statement of the girl, such a statement is not admissible in evidence in a proceeding started against the accused under S. 366 I. P. C., as the Sub-Inspector of Delhi has jurisdiction to investigate the case by virtue of S. 156(1) read with S. 181(4) of the Cr. P. C.¹¹⁰

The accused are not entitled to copies of statements made by witnesses to the Inspector of Excise at his enquiry, but they are entitled to use the original statements under S. 145 of the Evidence Act and they should be sent for under S. 94 Cr. P. C., if they are required by the accused.¹¹¹ An Excise Officer is not to be regarded as a Police-officer for the purpose of S. 162 Cr. P. C.¹¹² But in a later case it has been held that a statement made by an accused person to an Excise Officer holding an investigation under S. 73 of the Excise Act is a statement under S. 162 of the Criminal Procedure Code by virtue of S. 74 of the Excise Act.¹¹³

S. 162 of the Code and S. 27 of the Evidence Act.—

S. 162 of the Code of 1882 contained the provision that "nothing in this section shall be deemed to affect the provisions of S. 27 of the Evidence Act." This clause has been omitted in the subsequent Code. Under the present amended S. 162, it was at first held by the Rangoon High Court that the Section must be taken as over-riding S. 27 of the Evidence Act. Thus, where in a case under S. 20 of the Arms Act, the Police-officer gave evidence that the accused, during the course of the investigation and while he was in custody, was taken to a certain place and when asked to point out the revolver as he had promised to do, pointed out the place where it was concealed and when asked to take up his own thing, did pick up a packet containing the revolver and some loaded cartridges: *held*, that such evidence was inadmissible, and the accused's gesture, in pointing out to the Police where the revolver was, was inadmissible as it, to all intents and purposes, was a statement;¹¹⁴ and that in such cases it would be necessary for the Police-officer merely to prove the fact discovered as a result of such information stating that he acted "on information received,"¹¹⁵ But a Full Bench of that High Court has now held that S. 27 of the Evidence Act is neither repealed nor affected by S. 162, and consequently "information received from a person accused of any offence in the custody of a Police-officer" is not a statement within the purview

110. *Kharaiti* (1933) 1933 A. L. J. 923 : 34 Cr. L. J. 1215 : A. I. R. 1933 A. 665 : 146 I. C. 199.

111. *Michael* (1933) 1933 M. W. N. 1270.

112. *Keratali* (1934) 61 C. 967 : 38 C. W. N. 1005 : 35 Cr. L. J. 1178 : A. I. R. 1934 C. 616 : 150 I. C. 980.

113. *Jogendra* (1935) 40 C. W. N. 29 [referring to *Amin Shariff* (1934) 61 C. 607 (F. B.) : 38

C. W. N. 930 : 59 C. L. J. 555 : 35 Cr. L. J. 1071 : A. I. R. 1934 C. 580 : 150 I. C. 561.]

114. *Nga Kyaing* (1925) 27 Cr. L. J. 658 : A. I. R. 1926 R. 112 : 94 I. C. 706 ; *Bawa Rowther* (1924) 26 Cr. L. J. 321 : A. I. R. 1925 R. 101 : 84 I. C. 545.

115. *Bawa Rowther* (1924) 26 Cr. L. J. 321 : A. I. R. 1925 R. 101 : 84 I. C. 545.

of S. 162(1) and its proof at the trial is not prohibited by the provisions of the latter Section.¹¹⁶

The same view has been taken by some of the other High Courts. Thus, it has been held that the provisions of S. 27 of the Evidence Act are quite independent of a Section of the Code and cannot be treated as impliedly repealed in consequence of the amendment of S. 162 of the Code.¹¹⁷ When it has been held that the words "any person" in S. 162 do not include an "accused" person, it has necessarily been held that S. 27 of the Evidence Act has not been affected by S. 162 of the Code.¹¹⁸ The Evidence Act is a separate statute dealing with an important branch of law and its provisions are independent of the rules of procedure contained in the Cr. P. C., and must have full scope unless it is clearly proved that they have been repealed or altered by another statute.¹¹⁹ The object of S. 162 is to prevent the statements of witnesses made before the Police from being used by the prosecution under Ss. 145, 155 and 157 of the Evidence Act, which Sections are not confined to criminal cases, and not to be repeal S. 27 of the Evidence Act.¹²⁰

The Madras High Court has taken a different view. It has held that the words "any person" comprehend a person who subsequently become the accused and the words "any purpose" include the purpose of prosecution or defence; so a statement made by the accused to a Police-officer in the course of his investigation immediately after the accused pointed out the place where the jewels worn by the murdered boy were hidden is not admissible in evidence though it may materially assist the defence, though, of course, it is open to the accused to repeat that statement in Court and call witnesses to support that statement.¹²¹ See

116. *Nga Tha Din* (1925) 4 R. 72 (F.B.) : 27 Cr. L. J. 881 : A. I. R. 1926 R. 116 : 96 I. C. 145 [Heald, J. dissenting]

117. *In re Semalai* (1924) 26 Cr. L. J. 840 : A. I. R. 1925 M. 574 : 86 I. C. 664 ; *Jagwa* (1925) 5 P. 63, 78 : 27 Cr. L. J. 484 : A. I. R. 1926 P. 232 : 93 I. C. 884 ; *Gila Takhat* (1928) 24 N. L. R. 158 (F.B.) : 30 Cr. L. J. 258 : A. I. R. 1929 N. 17 : 114 I. C. 273 ; *Faujdar* (1933) 55 A. 463 : 34 Cr. L. J. 875 : A. I. R. 1933 A. 440 : 144 I. C. 1021.

118. *Rannun* (1926) 7 L. 84 : 27 Cr. L. J. 709 : A. I. R. 1926 L. 88 : 94 I. C. 901 ; *Umer Duraz* (1924) 26 Cr. L. J. 778 : A. I. R. 1925 S. 237 : 86 I. C. 410 ; *Hussainbibi* (1925) 20 S. L. R. 74 : 27 Cr. L. J. 456 : A. I. R. 1926 S. 151 : 93 I. C. 248.

119. *Rannun* (1926) 7 L. 84 : 27 Cr. L. J. 709 : A. I. R. 1926 L. 88 : 94 I. C. 901. *See also* *Muhammad* (1934) 36 Cr. L. J. 697 : A. I. R. 1934 L. 695 : 155 I. C. 260 [It seems there is some conflict in the rulings of the Lahore High

Court. See notes under the Heading "*What does not amount to a statement within S. 162,*" ante]

120. *Azimaddy* (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227 [following *Nga Tha Din* (1925) 4 R. 72 (F.B.) : 27 Cr. L. J. 881 : A. I. R. 1926 R. 116 : 96 I. C. 145 ; *Rannun* (1926) 7 L. 84 : 27 Cr. L. J. 709 : A. I. R. 1926 L. 88 : 94 I. C. 901 ; *Jagwa* (1925) 5 P. 63 : 27 Cr. L. J. 484 : A. I. R. 1926 P. 232 : 93 I. C. 884]

121. *Sheikh Kalesha* (1931) 1931 M. W. N. 715 : 33 Cr. L. J. 132 : A. I. R. 1931 M. 779 : 135 I. C. 364 [not following *Azimaddy* (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227 ; *Nga Tha Din* (1925) 4 R. 72 (F.B.) : 27 Cr. L. J. 881 : A. I. R. 1926 R. 116 : 96 I. C. 145 ; *Jagwa* (1925) 5 P. 63 : 27 Cr. L. J. 484 : A. I. R. 1926 P. 232 : 93 I. C. 884 ; *Rannun* (1926) 7 L. 84 : 27 Cr. L. J. 709 : A. I. R. 1926 L. 88 : 94 I. C. 901]

notes under Heading "*What does not amount to a statement to the Police within the meaning of S. 162, ante*).

But evidence of incriminating statements made by an accused person while in the custody of the Police and of his having pointed out the places where he has taken an abducted woman during the course of the night in which the offence of abduction is alleged to have been committed are not admissible in evidence.¹²²

The Chief Court of Nagpur held at first that S. 162 over-rides the provisions of S. 27 of the Evidence Act,¹²³ but later rulings have held that it does not in any way affect S. 27.¹²⁴

When is the accused entitled to get copies of the recorded statement.—

Under the amended S. 162, it is obligatory on the part of a Judge to give the accused copies of the statements recorded under S. 161 of the Code subject only to the exclusion of irrelevant matter which the public interest requires should not be disclosed. But it is only at the time of cross-examination and when the cross-examination has laid the foundation for the suggestion that the evidence given by the witness in Court is contradicted by his statement recorded under S. 161 Cr. P. C., that the accused is entitled to ask the Judge to refer to the writing and grant him copies. S. 162 does not impose a duty on the Judge of granting copies of the statement recorded under S. 161 before the cross-examination has been opened.¹²⁵ There is no real ambiguity so far as the granting of copy is concerned. Two points in particular stand out, and strict adherence to them, which unfortunately is rare, will obviate much confusion. In the first place, the question of furnishing to the accused a copy of the statement of a witness recorded by the police in the course of the investigation into an offence does not at all arise until the witness is called for the prosecution at the inquiry or trial in respect of the offence ; and secondly, the Court is not competent to direct that the accused be furnished with a copy of it unless it contains something which constitutes a contradiction to a statement made by the witness in his deposition at such inquiry or trial. These two circumstances must co-exist before an accused is entitled to such a copy. Where the Court has ordered such copies to be furnished, it is bound to postpone the cross-examination of the witnesses until such copies are furnished to the accused and to afford the accused an opportunity to cross-examine after receiving such copies. Omission to do so constitutes a direct violation of the statutory provisions of S. 203 (2) Cr. P. C., and vitiates a commitment.¹²⁶ The above

122. Keramat (1925) 42 C. L. J. 524 : 27 Cr. L. J. 263 : A. I. R. 1926 C. 320 : 92 I. C. 439.

123. Bhagia (1927) 28 Cr. L. J. 340 : A. I. R. 1927 N. 203 : 100 I. C. 820.

124. Gola Takhat (1928) 24 N. L. R. 158 (F.B.) : 30 Cr. L. J. 258 : A. I. R. 1929 N. 17 : 114 I. C. 273 ; Sheobalak (1927) 11 N. L. J. 7 : 29 Cr. L. J. 400 : A. I. R. 1928 N. 108 : 108 I. C. 442. See also Ganpati (1910) 6 N. L. R. 180 : 12 Cr. L. J. 60 : 8 I. C. 1181 (under the old Section)

125. Madari (1926) 54 C. 307 : 28 Cr. L. J. 582 : A. I. R. 1927 C. 514 : 102 I. C. 550 [In re Peramasami (1925) 27 Cr. L. J. 100 : A. I. R. 1926 M. 183 : 91 I. C. 532] ; But see Hari (1926) 9 N. L. J. 167 : 28 Cr. L. J. 14 : A. I. R. 1927 N. 24 : 99 I. C. 46 and other cases noted below ; and Babarali (1928) 56 C. 840 : 49 C. L. J. 197 : 30 Cr. L. J. 580 : A. I. R. 1929 C. 182 : 116 I. C. 167.

126. Saadat Mian (1926) 6 P. 329 : 28 Cr. L. J. 709 : A. I. R. 1927 P. 243 : 103 I. C. 597.

view has been modified and it has subsequently been held that application for copies should not be refused on the ground that it might help the defence or that possibly there was no contradiction. The provisions of S. 162 are imperative that the Court shall, on the request of the accused, direct that the accused be furnished with a copy. The use that that copy may be put to later on may be subject-matter of inquiry, when the proper time arises, and then it may be open to the Court to accept or reject the contention of the accused that he is making a proper use of the copy in terms of the Section. But a refusal to grant copies can only be made if the requirements of the second proviso to S. 162 are satisfied, namely, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest; the Court shall record such opinion before excluding such parts from the copy of the statement furnished to the accused;¹²⁷ otherwise, the accused is entitled to a copy of the whole of the statement.¹²⁸ An application for copies can be made even before the cross-examination of the witness concerned is begun.¹²⁹

The Patna High Court has also held¹³⁰ that there is nothing in the Section which requires that the cross-examination should have been opened and the accused should have laid the foundation for the granting of a copy (as has been held in the Calcutta case, *Madari*, (1926) 54 C. 307 : A. I. R. (1927) C. 514 : 28 Cr. L. J. 582). In the above case Jawala Prasad, J. observed that the discretion which was vested in the Court formerly of granting such copies has now been taken away and under the amended Code it has now become imperative upon the Court to grant copies to the accused at his request. And it has been held that the Court cannot refuse to grant copies because on perusal of the statements it considers that there is apparently no contradiction of the deposition in Court.¹³¹ There is nothing in the Section to authorise the Court to look into the statement in the police diaries for the purpose of finding out whether it is contradictory to the statement made in Court or not, before granting the application. That is really the function of the lawyer for the accused after a copy of the statement has been granted to him. There may be cases in which the accused or his lawyer is inclined to treat certain statements as contradictory whereas the Court may think there are no contradictions and there is nothing in the Code to suggest that the decision of the

127. Chedi Prasad (1927) 8 P. L. T. 613 : 28 Cr. L. J. 597 : A. I. R. 1927 P. 325 : 102 I. C.

773. See also Nga U Khine (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66 ; Hari (1934) 28 S. L. R. 397 : 36 Cr. L. J. 1161 : A. I. R. 1935 S. 145 : 157 I. C. 697.

128. Nga U. Khine (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66.

129. Hari (1926) 9 N. L. J. 167 : 28 Cr. L. J. 14 : A. I. R. 1927 N. 24 : 99 I. C. 46.

130. Ramgulam (1927) 7 P. 205 : 29 Cr. L. J. 297 :

A. I. R. 1928 P. 215 : 107 I. C. 817. See also Sri Krishna (1928) 29 Cr. L. J. 715 : A. I. R. 1928 P. 593 : 110 I. C. 459 ; Tahal (1930) 53 A. 94 : 32 Cr. L. J. 578 : A. I. R. 1931 A. 34 : 130 I. C. 696 ; Babarali (1928) 56 C. 840 : 49 C. L. J. 197 : 30 Cr. L. J. 580 : A. I. R. 1929 C. 182 : 116 I. C. 167 [doubting *Madari* (1926) 54 C. 307 : 28 Cr. L. J. 582 : A. I. R. 1927 C. 514 : 102 I. C. 550].

131. Fasiuddin (1929) 30 Cr. L. J. 728 : A. I. R. 1929 N. 172 : 117 I. C. 213 ; Murtiza Khan (1929) A. I. R. 1934 N. 138.

Court on the point must prevail, nor is there anything in the language of the Section to suggest the view that the accused are to be debarred from examining the statement for themselves to find out if there are any contradictions merely because the Court has formed an opinion that there are no contradictions.¹³² S. 162 is not inapplicable to cases where the Police, after investigation, had refused to challan and the proceedings were started on a complaint; accused may, in such cases, ask for copies of the statements before the Police.¹³³ Statements made to a Police-officer in the course of an investigation under S. 174 Cr. P. C., even though it is conducted in the presence of two or more respectable men are none the less statements under S. 162, and the accused is therefore not entitled to copies. Such statements are, therefore, not public documents, and the procedure which governs the grant of copies of statements under S. 162 governs also the grant of copies of statements made at the inquest.¹³⁴ When a Medical-officer is not examined at the beginning of a *post-mortem* inquiry, a copy of the *post-mortem* certificate ought to be given to the accused for the purpose of enabling him to conduct his defence; similarly, he should be given a copy of the inquest report (excluding statements made therein) when the Investigating Police-officer is not examined at the beginning of the inquiry.¹³⁵ S. 172 of the Code does not provide for the recording of statements of witnesses, but any statements of witnesses that are recorded, in whatever form those statements are recorded, are recorded under S. 161, and the defence have the right to ask for copies of such statements for the purpose mentioned in S. 162.¹³⁶ When a witness was tendered by the prosecution and was discharged without being examined or cross-examined, the defence is not entitled to a copy of the statement made by the witness to the Police.¹³⁷

If the accused have not availed themselves of the opportunity of asking for copies of the statements during the Committing Magistrate's inquiry, they have no further right under S. 162 than to go to the Judge at the time of the trial and ask him to grant such copies.¹³⁸ It is not the intention of the amended Section that the Judge should consider whether a foundation has been laid by way of cross-examination before copies can be granted.¹³⁹ So far as

132. Jhari Gope (1928) 8 P. 279 : 30 Cr. L. J. 858 : A. I. R. 1929 P. 268 : 118 I. C. 130 ; Usman (1930) 24 S. L. R. 239 : 31 Cr. L. J. 592 : A. I. R. 1930 S. 153 : 123 I. C. 689 ; Nek Ram (1930) 32 Cr. L. J. 370 : A. I. R. 1931 A. 273 : 129 I. C. 267.

133. Hari (1926) 9 N. L. J. 167 : 28 Cr. L. J. 14 : A. I. R. 1927 N. 24 : 99 I. C. 46.

134. In re Maruthamuthu (1926) 50 M. 750 : 28 Cr. L. J. 463 : A. I. R. 1927 M. 512 : 101 I. C. 495 ; Banta Singh (1930) 31 Cr. L. J. 444 : A. I. R. 1930 L. 457 : 122 I. C. 491. *Contra*, Rajeswari (1933) 37 C. W. N. 732 : 35 Cr. L. J. 530 : A. I. R. 1933 C. 861 : 147 I. C. 1007.

135. In re Maruthamuthu (1926) 50 M. 750 : 28 Cr.

L. J. 463 : A. I. R. 1927 M. 512 : 101 I. C. 495.

136. Sadhu (1927) 32 C. W. N. 280 : 29 Cr. L. J. 531 : A. I. R. 1928 C. 260 : 109 I. C. 355 ; Hari (1934) 28 S. L. R. 397 : 36 Cr. L. J. 1161 : A. I. R. 1935 S. 145 : 157 I. C. 697.

137. Wajid Ali (1927) 7 P. 153 : 30 Cr. L. J. 273 : A. I. R. 1929 P. 34 : 114 I. C. 220.

138. Babarali (1928) 56 C. 840 : 49 C. L. J. 197 : 30 Cr. L. J. 580 : A. I. R. 1929 C. 182 : 116 I. C. 167.

139. Babarali (1928) 56 C. 840 : 49 C. L. J. 197 : 30 Cr. L. J. 580 : A. I. R. 1929 C. 182 : 116 I. C. 167 [doubting Madari (1926) 54 C. 307 : 28 Cr. L. J. 582 : A. I. R. 1927 C. 514 : 102 I. C. 559]

proceedings before charge are concerned, copies should not be granted until the stage of cross-examination is reached. But if that stage be allowed to go by without application being made, an accused must wait until the witness is again subjected to cross-examination before he can claim grant of a copy. For, in the first place, until the witness so appears there is no certainty that he will be available for cross-examination and therefore no certainty that the statement can be used for the only purpose for which the accused may possess it. Further, if the law requires that the grant of the copy for use in the original cross-examination should be contingent upon that cross-examination being due to begin, the same principle would seem to apply to cross-examination after charge. Upon a request for a copy being made the Court must necessarily afford the accused a reasonable opportunity for obtaining it before he is deprived of the opportunity to cross-examine upon it. But with a little contrivance that ought not to result in serious delay.¹⁴⁰ An accused is not entitled to a copy of a statement made by a prosecution witness under S. 162 until the witness is sought to be cross-examined. But, as a matter of practice, there is no harm if a copy of the statement is given at an earlier stage.¹⁴¹ If the Magistrate did not grant copies to the accused when he wanted to cross-examine further the prosecution witnesses after framing of the charge and passed judgment in the case, the Appellate Court should remand the case and allow the copies to the accused.¹⁴²

The Nagpur Chief Court and the Allahabad High Court have gone the length of holding that the accused person has the right to apply for copies as soon as a witness is called for the prosecution either in an inquiry or in a trial.¹⁴³ The Bombay High Court has held that application for copy must be made when the prosecution witness appears in the witness-box.¹⁴⁴ The Rangoon High Court has held that the accused may apply for copy of the statement at any time after the witness has entered into the witness-box and while he is giving evidence ; the cross-examination of the witness must be adjourned until the necessary copy has been given.¹⁴⁵

The Privy Council has laid down that there is nothing improper in solicitors for the accused calling upon the prosecution to produce all previous statements made by the accused

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| <p>140. Vedi (1929) 1929 M. W. N. 885 : 31 Cr. L. J. 414 : A. I. R. 1930 M. 185 : 122 I. C. 463.</p> <p>141. Ghulam Nabi (1929) 30 Cr. L. J. 760 : A. I. R. 1929 L. 429 : 117 I. C. 377.</p> <p>142. Raghya (1929) 30 Cr. L. J. 1097 : A. I. R. 1929 N. 240 : 119 I. C. 675 [following Sulaiman (1928) 6 R. 672 : 30 Cr. L. J. 538 : A. I. R. 1929 R. 87 : 115 I. C. 899, where the state of the law before and after the amending Act of 1923 is compared]</p> <p>143. Fasiuddin (1929) 30 Cr. L. J. 728 : A. I. R. 1929 N. 172 : 117 I. C. 213 ; Suraj Bali (1934) 56 A. 750 : 36 Cr. L. J. 65 : A. I. R. 1934 A. 340 : 152 I. C. 249 ; Murtiza Khan (1929) A. I. R. 1934 N. 138.</p> | <p>144. Shaikh Usman (1927) 52 B. 195 : 29 Cr. L. J. 221 : A. I. R. 1928 B. 23 : 107 I. C. 57.</p> <p>145. Nga U. Khine (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66 [referring to Babarali (1928) 56 C. 840 : 49 Cr. L. J. 197 : 30 Cr. L. J. 583 : A. I. R. 1929 C. 182 : 116 I. C. 167 ; Madari (1926) 54 C. 307 : 27 Cr. L. J. 582 : A. I. R. 1927 C. 514 : 102 I. C. 550 ; Tahal Saithwar (1930) 53 A. 94 : 32 Cr. L. J. 578 : A. I. R. 1931 A. 34 : 130 I. C. 696 ; Saadat Mian (1926) 6 P. 329 : 28 Cr. L. J. 709 : A. I. R. 1927 P. 243 : 103 I. C. 597 ; Ramgulam (1927) 7 P. 205 : 29 Cr. L. J. 297 : A. I. R. 1928 P. 215 : 107 I. C. 817].</p> |
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and the prosecution witnesses. Even when a witness, in his cross-examination in Court, admits having previously made a different statement and gives the substance thereof, the accused is entitled to have the documents for the purpose of comparison *in extenso* with the oral evidence and for an examination of the circumstances under which the statements of the witness changed their purport.¹⁴⁶

Refusal or neglect to supply the accused with copies—Effect of.—

An improper omission to comply with the request of the accused to call for the police diary and to supply him with copies of the statements made by a prosecution witness before the Investigating-officer vitiates a trial.¹⁴⁷ When a copy the statement made by a witness before the Police is asked for, it is the bounden duty of the Magistrate, and it does not depend on his volition or good will, that he should refer to the police statement and furnish a copy, or record a definite order that he did not think it expedient in the interest of the public to furnish the accused with it.¹⁴⁸ In such cases, an oral request should be entertained as the law does not prescribe any application; the Magistrate need not ask the accused the reason for such an application because the general purpose is to contradict a witness. It will be good ground for transfer of the case, if the Magistrate delays and ultimately refuses to furnish the copies.¹⁴⁹ If the statements were not reduced to writing, then the accused could not be held to be prejudiced by not being given copies of the statements, but the Police-officer's report should certainly have been placed on the record, if the accused so desired.¹⁵⁰ It is only in two cases that the Court can refuse to grant copies: (1) When it is of opinion that any part of such statement is not relevant; and (2) when it is of opinion that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest. When the only reasons recorded for refusing copies was that the statements had not been recorded in full and that all that was recorded was a memorandum of the same: *Held*, that the reason recorded was not a valid one for supporting the order of refusal and the order was consequently illegal. *Per Curiam*—If an examination of the record showed that the real reason of the Court for refusing copies was the reason laid down by the law, then the mere fact that the Court had not recorded its opinion may not vitiate the trial.¹⁵¹ Failure to observe the provisions of S. 162 amounts only to an error curable under S. 537, provided there has

146. Mahadeo (1936) 40 C. W. N. 1164 (P. C.).

147. Hari (1926) 9 N. L. J. 167 : 28 Cr. L. J. 14 : A. I. R. 1927 N. 24 : 99 I. C. 46 ; Bansidhar (1930) 53 A. 458 : 32 Cr. L. J. 562 : A. I. R. 1931 A. 262 : 130 I. C. 625. *See also* Sri Krishna (1928) 29 Cr. L. J. 715 : A. I. R. 1928 P. 593 : 110 I. C. 459 ; Saadat Mian (1926) 6 P. 329 : 28 Cr. L. J. 709 : A. I. R. 1927 P. 243 : 103 I. C. 597.

148. Ghassoo (1930) 1930 A. L. J. 606 : 31 Cr. L. J. 555 ; A. I. R. 1930 A. 737 : 123 I. C. 685 ; Chedi Prasad (1927) 8 P. L. T. 613 : 28 Cr. L. J. 597 : A. I. R. 1927 P. 325 : 102

I. C. 773 ; Ramgulum (1927) 7 P. 205 : 29 Cr. L. J. 297 : A. I. R. 1928 P. 215 : 107 I. C. 817 (Per Jawala Prasad, J.) ; Jhari Gope (1928) 8 P. 279 : 30 Cr. L. J. 858 : A. I. R. 1929 P. 268 : 118 I. C. 130.

149. Ghassoo (1930) 1930 A. L. J. 606 : 31 Cr. L. J. 555 ; A. I. R. 1930 A. 737 : 123 I. C. 65.

150. Abdul Karim (1930) 7 O. W. N. 957 : 32 Cr. L. J. 632 : A. I. R. 1930 O. 505 : 131 I. C. 74.

151. Bansidhar (1930) 53 A. 458 : 32 Cr. L. J. 562 : A. I. R. 1931 A. 262 : 130 I. C. 625.

been no miscarriage of justice. The Appellate Court must inspect the statements refused to the accused and find out if independently of them there was sufficient material for the decision. In many cases it may be difficult to decide the question. Each case must depend upon its own circumstances. But, generally speaking, if the statement to the Police of a material prosecution witness would have been of assistance to the defence, it may be proper to hold that the omission to supply it has occasioned a substantial failure of justice.¹⁵²

Improper admission of evidence in contravention of S. 162—Effect of,—

In the absence of any prejudice to the accused, the improper admission of evidence in contravention of the provisions of S. 162 is not a ground for a new trial or for a reversal of the judgment of the lower Court.¹⁵³ There is nothing in S. 162 or in the nature of the subject-matter dealt with by the Section to warrant the view that a breach of the provisions of the Section, however slight, is sufficient to vitiate a trial. Apart from the question of real prejudice, therefore, it is of no avail in revision for a petitioner merely to show that during the course of the trial certain witnesses were cross-examined with reference to statements made by them to the Police in the course of investigation under S. 161, contrary to the provisions of S. 162.¹⁵⁴ Rankin, C. J. observed in the above case as follows: "The purpose of S. 162 is to amend for the purpose of criminal trials certain Section in the Evidence Act which states what evidence is admissible and inadmissible in certain circumstances. It is quite true that apart from S. 167 of the Evidence Act it would be open to a person accused to complain for the purpose of S. 537 Cr. P. C., that he has been prejudiced, e. g., before the Jury by certain questions contrary to S. 162 being admitted and allowed to be answered. Apart from questions of real prejudice it does not seem to me that it is of any avail in revision for a petitioner merely to show that out of the numerous questions and answers put in the course of the trial one or more of them is contrary to S. 162. That Section is very difficult to apply and it will constantly happen, I am afraid, that breaches of the Section may take place sometimes harmful, sometimes harmless, but always objectionable. But the question in revision is one of such technicality as not to enable the trial to be upset when it is clear that there has been no prejudice to the accused." In considering whether a particular infringement of the provisions of Cr. P. C. is one which does or does not come within the purview of S. 537, what one has to consider is whether any vital rule of procedure has been broken and whether the irregularity goes to the root of the proceedings.¹⁵⁵ Where the Magistrate not only

152. Hari (1934) 28 S. L. R. 397 : 36 Cr. L. J. 1161 : A. I. R. 1935 S. 145 : 157 I. C. 697.
[referring to Bechu Chaube (1922) 45 A. 124 : 24 Cr. L. J. 67 : A. I. R. 1923 A. 81 : 71 I. C. 115 : Nurmahomed (1930) 54 B. 934 : 32 Cr. L. J. 239 : A. I. R. 1930 B. 595 : 129 I. C. 156]
153. Ramyad (1925) 7 P. L. T. 673 : 27 Cr. L. J. 753 : A. I. R. 1926 P. 211 : 95 I. C. 273 ;
Moffinder (1931) 33 Cr. L. J. 97 : A. I. R. 1932 L. 103 : 135 I. C. 209.

154. Sajjad (1926) 45 C. L. J. 199 : 28 Cr. L. J. 446 : A. I. R. 1927 C. 372 : 101 I. C. 478.
155. Nurmahomed (1930) 54 B. 934 : 32 Cr. L. J. 239 : A. I. R. 1930 B. 595 : 129 I. C. 156
[distinguishing Subramania Iyer (1901) 28 I. A. 257 : 3 Bom. L. R. 540 : 25 M. 61 : 5 C.W.N. 866 ; and applying Ashutosh (1907) 35 C. 61 (F. B.) : 11 C. W. N. 1011 : 6 C. L. J. 320 and Bechu Chaube (1922) 45 A. 124 : 24 Cr. L. J. 67 : A. I. R. 1923 A. 81 : 71 I. C. 115.]

referred in his judgment to the statements of some of the witnesses for the prosecution made to the Police, which had not been proved as required by S. 162, but he also took into consideration the statements made to the Police during the investigation by persons who were not examined at all at the trial either by the prosecution or by the defence: *Held*, that the findings of the Magistrate were vitiated (no retrial was ordered in this case).¹⁵⁶ It is wrong for the Judge to allow a police report containing the statement of the accused regarding the place of crime to be exhibited and to refer to that report in his judgment.¹⁵⁷ To believe a witness because a perusal of the police diaries shows that he was examined at the earliest opportunity and had made the same statement is to make an improper use of the diaries.¹⁵⁸ A Court is not justified in admitting such statements unless the accused or his advocate asks the Court to refer to such record.¹⁵⁹ This does not mean that the Court has no right to look into the police diaries unless asked to do so by the accused or his advocate. Certain observations of Dunkley, J. in *Nga U Khine v. E.*, (1935) 13 R 1 : A. I. R. 1935 R. 98 : 36 Cr. L. J. 665, were to the effect that the police papers could only be made use of by the accused and the Court must not refer to the police papers unless asked to do so by the accused. On a reference to a Full Bench,¹⁶⁰ it was held that such a view was incorrect. When the trying Magistrate went through the police diary and observed that certain discrepancies in the evidence of the prosecution witnesses were not material to the facts in issue, it is a fair inference that he was presumably influenced by other parts of the diary corroborating the witness in Court. Such use of the diaries being forbidden by law, the conviction must be set aside.¹⁶¹ Reference by Court to statements to Police with a view to contradict a prosecution witness is entirely erroneous, when copies were not given to the accused and no attempt was made to prove them.¹⁶²

The power of the Judge under S. 165 of the Evidence Act cannot be exercised for the purpose of introducing evidence in contravention of S. 162 Cr. P. C. Where the Judge put to a witness certain alleged statements of the prosecution witnesses which had not been proved for the purpose of contradicting him, *held*, that the procedure vitiated the trial.¹⁶³

A girl who was raped by two constables made statements to other constables about the conduct of the former two. The Sub Inspector then came, recorded the girl's statement and started investigation. The Deputy Superintendent came subsequently and in his turn questioned

156. *Devi Das* (1928) 10 L. 794 : 31 Cr. L. J. 343 : A. I. R. 1930 L. 318 : 122 I. C. 93.

157. *Dur Mahomed* (1930) 32 Cr. L. J. 178 : A. I. R. 1930 S. 305 : 128 I. C. 684.

158. *Fazal* (1926) 27 Cr. L. J. 614 : A. I. R. 1926 L. 363 : 94 I. C. 358.

159. *Nga Po Chon* (1926) 4 R. 356 : 27 Cr. L. J. 1371 : A. I. R. 1927 R. 80 : 98 I. C. 491.

160. *Nga Lun Thuang* (1935) 13 R. 570 (F. B.) : 36 Cr. L. J. 1487 : A. I. R. 1935 R. 370 : 158 I. C. 784.

161. *Sakal v. Palakdhari* (1930) 11 P. L. T. 837 : 32 Cr. L. J. 735 : A. I. R. 1931 P. 96 : 131 I. C. 535.

162. *Ahmad* (1927) 29 Cr. L. J. 14 : A. I. R. 1928 L. 144 : 106 I. C. 350 ; *Ram Rang* (1928) 29 Cr. L. J. 493 : A. I. R. 1928 L. 820 : 109 I. C. 221.

163. *Rahijaddi* (1930) 58 C. 1009 : 35 C. W. N. 317 : 32 Cr. L. J. 841 : A. I. R. 1931 C. 189 : 132 I. C. 159.

the girl. All the police-men gave evidence of the statements made to them. *Held*: that the statements made to constables before the Sub Inspector recorded the statement were admissible, but the statement to the Deputy Superintendent was inadmissible. The conviction, however, was upheld on other evidence.¹⁶⁴

Duty of the Judge—Misdirection.—

It is improper to place before the Jury maps containing statements of witnesses or of information received by the Police-officer, preparing the map, from other persons; it is highly prejudicial in the interests of justice to allow statements which may or may not be admissible in evidence to be introduced in a case by indirect means.¹⁶⁵

Where a witness supported the prosecution in his statement before the Police but resiled from that statement before the Committing Magistrate and Sessions Court, it is the duty of the Judge to withhold from the Jury's knowledge the statement made by the witness to the Police unless it was proved in the manner provided by law at the request of the accused.¹⁶⁶

Where the statements to Police do not agree with the statements in Court of a witness, the Judge should leave it to the Jury to see if the latter are made unreliable thereby.¹⁶⁷

When a Judge wrongly admitted in evidence a list of ornaments alleged to be stolen in the course of the dacoity, which list was given to the Investigating Officer during the course of the investigation and so amounted to a statement under S. 162, and the list was given after a search by the Police in the course of which ornaments were found on the person of the accused's wife and it was alleged that they were the ornaments stolen during the dacoity: *Held*, that its admission having caused misdirection, the verdict of the Jury and the sentence should be set aside.¹⁶⁸

A reference by the Judge to statements contained in police papers for the purpose of corroboration or otherwise of the confessional statements of the accused is in contravention of the provisions contained in S. 162, and such reference is not permissible in law.¹⁶⁹

It is not proper for the Sessions Judge to read out the order by which he refused to give to the accused copies of the statements recorded in police diaries within the hearing of the jurors. If he does so, he ought to warn the Jury that the statements made before the Police were

164. *Mir Mazarali* (1933) 57 B. 400 : 34 Cr. L. J. 870 : A. I. R. 1933 B. 266 : 144 I. C. 985.

165. *Bhagirathi* (1925) 30 C. W. N. 142 : 27 Cr. L. J. 222 : A. I. R. 1926 C. 550 : 92 I. C. 174 [following *Abinash* (1924) 52 C. 172 : 28 C. W. N. 995 : 26 Cr. L. J. 350 : A. I. R. 1924 C. 1029 : 84 I. C. 654 ; *Mofizel* (1925) 29 C. W. N. 842 : 25 Cr. L. J. 1298 : A. I. R. 1925 C. 909 : 89 I. C. 242.]

166. *Gahub* (1925) 30 C. W. N. 503 : 27 Cr. L. J.

641 : A. I. R. 1926 C. 793 : 94 I. C. 593 ; *Keramat* (1925) 42 C. L. J. 528 : 27 Cr. L. J. 277 : A. I. R. 1926 C. 147 : 92 I. C. 453.

167. *Tajali* (1927) 7 P. 50 : 28 Cr. L. J. 843 : A. I. R. 1928 P. 31 : 104 I. C. 459.

168. *Fulbash Sheikh* (1929) 31 Cr. L. J. 127 : A. I. R. 1929 C. 448 : 120 I. C. 458.

169. *Kashim Ali* (1934) 38 C. W. N. 586 : 36 Cr. L. J. 70 : A. I. R. 1934 C. 651 : 152 I. C. 234.

legally no evidence and that they should not be influenced by the note of the Judge that there were no statements in the diaries which might be used to contradict the statements made by prosecution witnesses.¹⁷⁰ Where the impression conveyed by a statement in the charge to the Jury is that the evidence of the witnesses before the Court found corroboration in the statements made by them before the Police, the statement constitutes misdirection, in as much as the Judge was acting in contravention to the provisions of S. 162 Cr. P. C.¹⁷¹ Where the alleged statements of the prosecution witnesses before the Police were not properly put in evidence under S. 162 Cr. P. C. and were not even proved as substantive evidence and yet the Judge made use of them in order to discredit the witness in so far as he did not support the case for the prosecution : *Held*, that the procedure adopted amounted to a misdirection vitiating the trial.¹⁷² It is a misdirection to ask the Jury to take into consideration against the accused a statement made by a witness before a Police Inspector or before a Magistrate, who, though an investigating Magistrate is not the Committing Magistrate, when such statement is withdrawn before the Committing Magistrate and before the Court of Session.¹⁷³

If statements made to the Police during investigation by prosecution witnesses are brought on record at the instance of the defence, the latter must take the consequences of getting them on record and cannot complain of misdirection, if the Judge in his charge to the Jury refers to them, provided he cautions the Jury that they are not to be taken as substantive evidence.¹⁷⁴

In a certain case in which statements recorded under S. 164 Cr. P. C., were freely used, the High Court observed,—“The learned Sessions Judge ought to have pointed out to the Jury that the statements recorded under S. 164 Cr. P. C. must have been recorded under circumstances which precluded the entire freedom of the witnesses which ought to be the foundation of a fair trial * * and ought to have drawn the attention of the Jury to the fact that that evidence should be received with great caution.”¹⁷⁵

Police diaries, being memorandum recorded at the time of the occurrence of the events to which they related, might properly have been put into the hands of the persons who made them, in order that they might refresh their memories from them. But it was illegal to use the diaries as substantive evidence, or to read them to the Jury. It is a very substantial and important misdirection.¹⁷⁶ Where in connection with a statement of a witness, the Judge told the Jury that the defence refrained from putting any question to the Inves-

170. *Jhari Gope* (1928) 8 P. 279 : 30 Cr. L. J. 858 : A. I. R. 1929 P. 268 : 118 I. C. 130.

171. *Ram Lal* (1934) 36 Cr. L. J. 135 : A. I. R. 1934 C. 717 : 152 I. C. 681.

172. *Rahijaddi* (1930) 58 C. 1009 : 35 C. W. N. 317 : 32 Cr. L. J. 841 : A. I. R. 1931 C. 189 : 132 I. C. 159.

173. *In re Sankappa* (1908) 31 M. 127 : 18 M. L. J. 66 : 7 Cr. L. J. 325.

174. *Jasimuddin* (1930) 35 C. W. N. 164 : 32 Cr. L. J. 1245 : A. I. R. 1931 C. 622 : 134 I. C. 763.

175. *Kali Singh* (1907) 7 C. L. J. 246 : 7 Cr. L. J. 315.

176. *Hurdut* (1867) 8 W. R. 68.

tigating Police-officer to prove that his previous statement was contradictory, which showed that his present story in Court was true : *Held*, that the reference to the statement made to the Police was at the most somewhat injudicious but was not at all material enough to have led to a miscarriage of justice. The Judge could have told the Jury that they were entitled to believe the witness, if they thought fit, unless the defence showed, as they had not even attempted to do, that he had on a previous occasion made a contradictory statement.¹⁷⁷

S. 164 Cr. P. C.

There was much conflict in judicial decisions as to the admissibility of a confession made to a Magistrate which, though purported to have been made under S. 164 Cr. P. C., did not comply with its provisions but was sought to be made admissible in evidence by calling the Magistrate as a witness in the case. The Privy Council has recently reviewed the case-law on the subject and pronounced an important judgment in *Nazir Ahmed v. K. E.*^{177a} In that case after the accused had been arrested, a Magistrate took them to the place of occurrence and after he had sent the Police away, the accused led him round and pointed out the places connected with the crime. The accused was said to have made a confessional statement at that time of which the Magistrate made rough notes and later on he dictated to a typist a memorandum from these rough notes which latter he destroyed. At the trial the Magistrate gave oral evidence of the confession and put in as a document a memorandum containing the substance but not all the matter of his statement. The memorandum was signed by himself and above the signature there was a certificate as to the voluntariness of the statement. It was *held*, that the oral evidence and the memorandum were both inadmissible. The Privy Council pointed out that the effect of Ss. 164 and 364 Cr. P. C., which must be construed together, is that a confession can be recorded by a Magistrate only in the manner prescribed in those Sections and can be proved only by such record ;—confessional statement not so recorded is inadmissible and can neither be proved orally by the Magistrate ; that S. 533 Cr. P. C., has no application where the Magistrate neither acted nor purported to act under S. 164 or S. 364 and when nothing is tendered in evidence as recorded or purporting to have been recorded under either of those Sections. Whether a Magistrate will at all record a confession made to him is, however, discretionary with him, and not obligatory ; but if he does record, he must proceed under S. 164. It was held that the Magistrate, acting under Ss. 164 and 364 Cr. P. C., is a judicial officer, though not a Court ; and the rule, applying to Courts, that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all, applies to S. 164. [*Taylor v. Taylor* (1875) L. R. 1 Ch. Div. 426, 431, referred to].

177. *Ramgarup* (1929) 9 P. 606 : 32 Cr. L. J. 72 :
A. I. R. 1930 P. 513 : 128 I. C. 121.

177 a. *Nazir Ahmed* (1936) 40 C. W. N. 1221
(P. C.).

Ss. 226 and 227 Cr. P. C.

Previous history.—The power to frame, alter or add to a charge as given by Ss. 226 and 227 of the Code has a history behind it. The Acts that regulated the procedure in criminal trials in the High Courts in India before the Criminal Procedure Supreme Courts Act, XVI of 1852, were Act IX of Geo. IV C. 74 and the Criminal Law Supreme Courts Act, XXXI of 1838. Both these Acts were silent as to the power of the Courts to allow amendments in indictments. In England, before the passing of Lord Campbell's Act, 14 and 15 Vic. C. 100, (passed in 1851) the Courts had a very limited power of making amendments, and it was found that criminals often escaped in consequence. It was determined, therefore, to enlarge the power of the Courts in that respect. The preamble to 14 and 15 Vic. C. 100 ran thus : "Whereas offenders frequently escape conviction on their trials by reason of technical strictness of criminal proceeding in matters not material to the merits of the case, and whereas such technical strictness may safely be relaxed in many instances, and whereas a failure of justice often takes place on trials by reason of variances between the statement in the indictment and the proof of names, dates, matters and circumstances therein mentioned, not material to the merits of the case, and by the mis-statement whereof the person on trial cannot have been prejudiced in his defence". S. 1 then enumerated the amendments that may be made. Next year *i.e.*, in 1852 the Indian Act XVI of 1852 was passed, and the preamble of it was almost identical with that of Lord Campbell's Act. The enacting Section, however, did not enumerate the amendments that might be made, but enacted generally that "whenever there shall appear to be any variance between the statement in the indictment and the evidence, it shall be lawful for the Court, if it shall consider such variance not material to the merits of the case and that the defendant cannot be prejudiced thereby in his defence upon the merits, to order the indictment to be amended".

Next came the Criminal Law Amendment Act XVIII of 1862 (amending the Code of Criminal Procedure, Act XXV of 1861), S. 1 of which said : "Whenever, on the trial of any indictment for an offence, there shall appear to be a variance between any statement in such indictment and the evidence offered in proof thereof, it shall be lawful for the Court before which the trial shall be held * * to order such indictment to be amended according to the proof." The Section also enacted that the requisite amendment should be made if the Court should consider that by the amendment the person indicted would not be prejudiced in his defence on the merits. In case of such prejudice, the accused might have been acquitted upon the original charge and charged anew before the Magistrate according to the facts and there need not have been failure of justice.¹⁷⁸

For the Mofussil Courts, the Code of 1861 (Act XXV of 1861) S. 244 provided as follows : "It shall be competent to any Court before which a trial is held, at any stage of the trial, to amend or alter the charge".

It was held under that Section that on a trial by Jury the Sessions Judge had no power to alter the charge after the delivery of the verdict.¹⁷⁹ It was also held under that Section

178. Govindas Haridas (1869) 6 B. H. C. R. 76.

179. Shek Ali (1868) 5 B. H. C. R. 9.

that though a Sessions Judge had power to alter or amend a charge, he could not add an entirely new charge (S. 193 I. P. C.), which was not even cognate to the original charge (S. 477 I. P. C.), on which the accused person was committed;¹⁸⁰ and the addition of a charge under S. 302 I. P. C., to one under S. 213 I. P. C., which were not cognate offences, was highly prejudicial.¹⁸¹

The Code of 1872 (Act X of 1872) altered the scheme and arrangement of the Code of 1861 (See Ss. 445, 446 and 453 of the former, in this connection). It regulated the procedure of the Criminal Courts, other than that of the High Courts in their Original Criminal Jurisdiction and of the Police Magistrates' Courts in the Presidency Towns, which were regulated by the High Court's Procedure Act X of 1875 and the Presidency Magistrates Act IV of 1877, respectively.

The Code of 1882, Act X of 1882, consolidated the laws on Criminal Procedure as applicable to the Presidency Towns as well as to the Mofussil. It recast and combined into one Code the Code of 1872 (Act X of 1872), the High Court's Procedure Act (X of 1875) and the Presidency Magistrates Act (IV of 1877). The Sections in it relating to the present subject were as follows :—

"S. 226—When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or in the case of a High Court, the Clerk of the Crown, may frame a charge or add to or otherwise alter the charge as the case may be, having regard to the rules contained in this Code as to the form of charges.

"S. 227—Any Court may alter any charge at any time before judgment is pronounced, or, in the case of trials before the Court of Session or High Court, before the verdict of the Jury is returned, or the opinions of the assessors are expressed.

"Every such alteration shall be read and explained to the accused".

Under the aforesaid Sections, the Bombay High Court held that the words "without a charge" in S. 226 will properly apply not only to a case in which there is no charge at all, but also to a case in which there is no charge of such an offence as the Sessions Judge or the Clerk of the Crown may think the prisoner ought to be tried for; that if the word 'alter' in S. 227 is to be taken to include 'addition', as it does in S. 226, the addition permitted must be an addition to some specific charge in the nature of an alteration, and not the addition of a new charge; and that the word 'charge' in the Cr. P. C. is used as the statement of a specific offence, and not as indicating the entire series of offences of which a person is accused.¹⁸² On the other hand, the Allahabad High Court, in one case,¹⁸³ held, that S. 226 did not apply in a case where the accused were already sent up on a charge on which they were ultimately convicted, and it could not be said that they were committed 'without a charge'; and in another case,¹⁸⁴ held, that the words 'alter any charge' in S. 227 would include the addition of a separate charge.

180. Waris (1871) 3 N. W. P. H. C. R. 337.

181. Bhubhakee (1872) 4 N. W. P. H. C. R. 16.

182. Appa (1884) 8 B. 200 [Scott, J. dissenting.]

183. Kharga (1886) 8 A. 665 : 6 A. W. N. 254.

184. Gordon (1887) 9 A. 525 : 7 A. W. N. 155
[dissenting from Appa (1884) 8 B. 200.]

The present Code (Act V of 1898) gave effect to the decision of the Bombay High Court in respect of S. 226 and to the decision of the Allahabad High Court with reference to S. 227. It kept the wordings of S. 226 as they were in the Code of 1832, but added three illustrations to the Section and the illustrations show that the view of the Bombay High Court was accepted. In S. 227, it inserted the words 'or add to' between the words 'alter' and 'any charge'. A definition of 'charge' was given in S. 4 (c) as including any head of charge when the charge contained more heads than one, not accepting the decision of the majority of the Judges in 8 B. 200 above, but adopting the view of Scott. J. who held that the word 'charge' is used in the Code, both as indicating the whole series of counts or heads of charge and also as indicating a charge of one specific offence.

Ss. 226 and 227 have not since been amended by any of the subsequent Amending Acts.

Distinction between S. 226 and S. 227.—

(1) S. 226 applies only to Courts of Session and High Courts ; while S. 227 applies to all Courts. (2) S. 226 applies only when the commitment was made without a charge or with an imperfect or erroneous charge, and the Court of Session or the High Court finds, on perusal of the record of the Committing Magistrate's Court *and before taking any evidence itself*, that framing of proper charges or additions or alterations in the charges already framed are necessary ; while S. 227 applies when, on the evidence taken after the framing of the charge or on reconsideration of the whole evidence, the Court finds that some other charge should be added or some additions or alterations in the existing charges are necessary. There is nothing, however, in either case, to debar the Court from consulting either party or from entertaining and deciding an application for addition or alteration of any charge, from either party, when the Court frames the original charge or charges after taking the preliminary evidence. But a Sessions Judge cannot draw up a charge for an offence, under S. 226, for which upon that evidence the prisoner could not have been committed, and then call fresh evidence to support the new charge, and convict upon it ; such an action on the part of the Judge must be pronounced *ultra vires*, and as this is not a mere error of procedure, but an improper assumption of jurisdiction, the conviction on the added charge must be quashed.¹⁸⁵ And it has even been held that the addition of a new charge of abetment of rape based upon supplementary evidence taken after the order of commitment on a charge under S. 372 I. P. C., and before the commencement of the trial in the Court of Session would not be right as it would amount to applying evidence taken upon a charge under one Section to a wholly different one.¹⁸⁶ S. 226 refers to the commencement of the trial and S. 227 to a subsequent stage.¹⁸⁷

185. Rama Varma Raja (1881) 3 M. 351 : 2 Weir 269. *See also* Abdul Aziz (1931) 53 C. L. J. 346 : 32 Cr. L. J. 1135 : A. I. R. 1931 C. 524 : 134 I. C. 314.

186. Sukee Raur (1893) 21 C. 97. *See also* In re Bhogi Reddi Ankamma (1932) 1932 M. W. N.

1162 : 34 Cr. L. J. 278 : A. I. R. 1933 M. 247 : 142 I. C. 138.

187. Vajiram (1892) 16 B. 414, 424 ; In re Bhogi Reddi Ankamma (1932) 1932 M. W. N. 1162 : 34 Cr. L. J. 278 : A. I. R. 1933 M. 247 : 142 I. C. 138.

Court's power to alter or add to any charge.—

The Court's power to alter or add to any charge as given by S. 227 presupposes the existence of some charge already framed. A charge can only be framed after some evidence has been adduced for the prosecution. A charge is nothing but a notice to the accused of the allegations made against him ; and Ss. 221-223 and the models of charges given in the schedule,¹⁸⁸ are designed for the purpose of giving the accused such a complete notice that there may not be any doubt in his mind as to the particular facts against him which he shall have to meet. Then again the evidence adduced may be such as to show that the accused has committed not one but more than one distinct offences and S. 233 says that for every distinct offence there shall be a separate charge and every such charge shall be tried separately except in cases mentioned in Ss. 234, 235 and 236.

When after the framing of the charge or charges the trial goes on in the same Court or in the Court of Session or High Court, there is, as between the Court and the accused *vis-a-vis*, the charge or charges already framed. Evidence may then be given of the existence or non-existence of the facts bearing on the charges and of such other facts as are declared to be relevant under the Evidence Act (S. 5, Evidence Act). If from such relevant evidence facts are established which disclose the commission by the accused of other distinct offence or offences or which modify or aggravate or alter the nature of the facts which constituted the offence already charged, the Court may, on those facts, alter the charge or charges already framed or add new charge or charges, provided that the added charge can be tried at that trial under the provisions of Ss. 234, 235 or 236 of the Code. So the Court cannot add a charge which cannot be tried at the same trial with the charge already framed.

The word 'may' shows that the Court is not bound to alter or add to the charge. It has a discretion in the matter. Failure of the Court to add a charge, which he could have done under S. 227, has not necessarily the effect of acquittal on that charge, unless it comes within the provisions of S. 403 of the Code.

The power of the Court to alter or add to a charge with a view to try it is limited by other provisions of the Code which debar a Court from taking cognizance of certain offences unless under specified conditions (Ss. 195-199).

The alteration or addition may be made by the Court of its own motion or on the application of either party.

The word 'verdict' in the Section means the final verdict which the Judge is bound to record.¹⁸⁹ See notes under Heading "*Meaning of verdict*" in Ch. VIII of Part II, *ante*.

It should be quite clear from the record of a Sessions trial what was the charge that was read over to the accused under S. 271 Cr. P. C. In a trial by a Court of Sessions, the actual charge-sheet, to which the accused is called upon to plead is a very important

188, Baban Khan (1877) 2 B, 142.

189. Appa (1884) 8 B. 200.

document. It should be drawn up and considered with extreme care and caution, so that the accused may have no doubt whatever as to the offence which he is called upon to answer, and the Judge of the appellate Court may have no doubt also upon the matter. Every addition or alteration made to the charge has to be read over and explained to the accused.¹⁹⁰

If several persons can properly be charged and tried together under S. 239 Cr. P. C., there is nothing to prevent other charges being added against one or more of such persons if the addition of such charges is permissible by the Code.¹⁹¹

Procedure after alteration or addition of charge.—

After the alteration or addition to the charge is made, and such alteration or addition is read and explained to the accused (Sub-s (2) of S. 227) the question arises what course to take as regards proceeding with the trial, that is to say, whether the trial should proceed immediately as if the new or altered charge had been the original charge or whether it should be postponed or a new trial should be directed. The answer depends on the consideration of prejudice to either party. If proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecution in the conduct of the case, the Court may do so (S. 228). If, on the other hand, in the opinion of the Court, such prejudice as aforesaid is likely to be caused, the Court may either direct a new trial or adjourn the trial for such period as may be necessary (S. 229). (See the cases noted under Heading "*Prejudice to the accused*," *post*). The trial is not, by the alteration or addition of a charge, opened up from the beginning; or if the accused had already been called upon to enter on their defence, there is no further obligation upon the Magistrate to examine the accused under S. 342 Cr. P. C.¹⁹² But in any case, the case shall have to be stayed, if the offence stated in the new or altered or added charge is one for the prosecution of which previous sanction is necessary, until such sanction is obtained, unless sanction has already been obtained for a prosecution on the same facts as those on which the new or altered or added charge is founded (S. 230). (See the cases noted under Heading "*Charge covered by Extradition proceeding, Sanction &c*", *post*).

When the trial proceeds, whether immediately or after adjournment or stay, the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the altered or added charge, any witness who may have been examined, and also to call any further witness whom the Court may think to be material (S. 231). (See cases noted under Heading "*Recalling of witnesses after addition or alteration of a charge*", *post*).

Application for addition or alteration of charge.—

At the commencement of a trial before a Court of Session on a charge under S. 206 I. P. C., the Public Prosecutor applied to the Court to frame new heads of charge under Ss.

190. Jagdeo Parshad (1920) 18 A. L. J. 442 : 21 Cr. L. J. 410 : 56 I. C. 58.

191. Mathuri (1935) 1936 A. L. J. 518 : 37

Cr. L. J. 794 : A. I. R. 1936 A. 337 : 163 I. C. 253.

192. Shamlal (1921) 1 P. 54, 56 : 23 Cr. L. J. 146 : A. I. R. 1922 P. 393 : 65 I. C. 610.

423 and 424 I. P. C. The Sessions Judge postponed passing any final decision upon this application, until it became apparent that the charge under S. 206 I. P. C., was not sustainable on the evidence adduced by the prosecution, when he refused it. *Held*, per Telang, J. that the Sessions Judge ought to have finally disposed of the application for framing additional charges at the very commencement of the trial when it was made, especially because it did not purport to be based on any facts other than those contained in the deposition recorded by the Committing Magistrate. *Held* also, that under S. 417 Cr. P. C. (of 1882) it was not open to Government to appeal to the High Court on the ground of the Sessions Judge's refusal to add new charges, or against any other interlocutory order made during the trial.¹⁹³ On this last point Telang, J. observed as follows: "We have no provision here answering to that which we have in the Code of Civil Procedure (S. 591), that, when an appeal is against a decree, all objections to interlocutory orders made prior to decree may be included in the grounds of appeal against the decree. The appeal allowed here is only "from any original or appellate order of acquittal". The order refusing to allow additional charges is not an order which falls within those terms. It is not even an order which can be said to form the basis of the order of acquittal, or a necessary condition of its tenability. An order, for instance, excluding as irrelevant a body of evidence tendered for the Crown, might lead to an acquittal as a logical or inevitable consequence. I do not wish in the above remarks to be understood as saying that in such a case the Government, on its appeal against the acquittal, would be bound by the order excluding evidence as one from which it could not appeal. But an order, like the one in this case, refusing to frame an additional charge, is not an order of that character. It does not in any way place the Crown at a disadvantage in proving the charges contained in the original indictment." An interlocutory order which has resulted in the acquittal of a prisoner on charges for which he was tried may, no doubt, be made a ground of appeal under S. 417 Cr. P. C. But where the interlocutory order is one passed under S. 227 Cr. P. C., refusing to add a fresh charge for which a fresh prosecution is permissible, in that case there has been no acquittal of the prisoner in respect of such additional charge and it cannot be relied upon as a ground for support of an appeal against the acquittal on other charges altogether. An order excluding evidence is one which can legitimately be attacked in appeal. Besides asking for an amendment of charges which is likely to prejudice the prisoner, it is always open to the Crown to have the prisoner acquitted on the original charges and to have him charged anew before a Magistrate according to new facts.¹⁹⁴

The accused kidnapped a minor girl from Bombay and took her to Ahmedabad where she was raped. He was charged with offences under Ss. 361, 376 and 114 I. P. C. As the offence of abetment of rape took place at Ahmedabad, the Presidency Magistrate of Bombay or the Bombay High Court had no jurisdiction to try the same. An application was then made to drop the offence under S. 114 I. P. C., and substitute in its place an offence under

193. Vajiram (1892) 16 B. 414.

1041. See also Govindas Haridas (1869) 6*

194. Per Ruychand A. J. C. in Stewart (1926) 27
Cr. L. J. 1217; A. I. R. 1927 S. 28; 97 I. C.

B. H. C. R. 76.

S. 109 I. P. C. : *Held*, that the Court should not at that stage grant an amendment of the charge as prayed for, because that would materially alter the nature of the case.¹⁹⁵

An application for withdrawal of a charge can be allowed, and the Court has inherent power to make an appropriate order.¹⁹⁶

Withdrawal of a charge added at the commencement of the trial.—

Accused was originally committed to the Court of Session on a charge under S. 395 I. P. C. When the trial commenced, the Judge of his own motion added additional charges under Ss. 147, 149 and 452 I. P. C. Prior to the conclusion of the trial the Judge withdrew the charges which he had himself added, and tried the prisoner on the original charge of dacoity, without putting the case on the additional charges to the assessors at all. Finally the accused persons were acquitted of the original charge of dacoity. On an application in revision for an order to direct the case to be tried out on the charges framed by the Judge himself, it was *held*, that although under S. 215 of the Code a commitment once made can only be quashed by the High Court, there is no express law which prohibits a Court of Session to withdraw a charge framed by itself at the commencement of a trial and which such Court subsequently considers to have been an improper charge, and to this extent the word "alter" in S. 227 must be taken to include 'withdraw' ; that the more usual procedure, where the Court considers there is no evidence to lay before the assessors is for the Court itself to record a finding under S. 289 Cr. P. C., to that effect ; but that Section applies only when there is no evidence and would not cover a case where the Court considers that the charge itself was improper.¹⁹⁷

Expunging or altering a charge at the commencement of the trial.—

Where the accused has been committed to take his trial on specific charges before the Sessions Court, the Judge has no power under S. 226 to expunge a charge before calling on the accused to plead to it.¹⁹⁸ Under S. 226, the Sessions Judge cannot, without assigning any reason, alter a charge of dacoity on which the accused has been committed for trial into one of robbery, at the commencement of the trial ; it was improper for the Sessions Judge to thus alter the character of the charge before hearing evidence.¹⁹⁹ The Judge's power to alter a charge under S. 226 of the Code is limited to imperfect or erroneous charges ; where there is nothing erroneous or imperfect in a charge of an offence under S. 471 I. P. C., but the commitment was illegal as the prosecution had been without sanction which was required under S. 195 Cr. P. C., the Sessions Judge cannot, in order to evade this defect, frame a charge under S. 472 I. P. C., and convict the accused under that Section. The want of necessary sanction is not a mere technical irregularity which would be

195. Mohanlal (1928) 30 Bom. L. R. 1253 : 30 Cr. L. J. 191 : A. I. R. 1928 B. 475 : 113 I. C. 617.

196. Pulin Behary (1912) 16 C. W. N. 1105 : 15 C. L. J. 517 : 13 Cr. L. J. 609 : 16 I. C. 257.

197. Dwarka Lal v. Mahadev (1890) 12 A. 551 :

10 A. W. N. 178. See Pulin Behary (1912) 16 C. W. N. 1105 : 15 C. L. J. 517, 582 : 13 Cr. L. J. 609 : 16 I. C. 257.

198. Poresollah (1880) 7 C. L. R. 143.

199. Paimullah (1911) 16 C. W. N. 238 : 13 Cr. L. J. 127 : 13 I. C. 783.

cured by S. 537 Cr. P. C.²⁰⁰ It is open to a Sessions Judge to add an alternative charge, but it is not a proper exercise of discretion to withdraw the charge which the Committing Magistrate thought to be proved and put the accused under a disadvantage by substituting another so that he might be deprived of the right of trial by Jury²⁰¹ Where two persons have been jointly committed in violation of S. 239 Cr. P. C., the Judge can charge and try them separately.²⁰² When an accused pleads guilty to a charge already framed, the Sessions Judge has no power to alter the charge upon the evidence on the record. Upon a charge of murder the accused pleaded "guilty". The Sessions Judge taking into consideration the circumstances of the case, reduced the charge to homicide not amounting to murder. *Held*, that the proceeding was illegal.²⁰³ Where several offences, are charged under the same Section, the Committing Magistrate shall frame the charge so as to contain a separate head for each offence. The omission of the Magistrate to do this may be remedied by the Sessions Judge by exercising the powers of amendment contained in S. 244 (now S. 226) Cr. P. C. of 1861. A Judge may, however, expunge a charge or direct the Jury to find a verdict of acquittal on it, if after hearing evidence he finds that there is no evidence to convict on that charge.²⁰⁴ The accused was committed to the Sessions Court on a charge under S. 409 I. P. C. The Court threw out the charge under that Section on the ground that it should have been brought under S. 420 I. P. C., and directed that separate trial should take place : *Held*, that the Court was ousted of its jurisdiction. The Sessions Judge could have amended the charge to one under S. 420 and he might then well have directed that that charge should be put before the Jury at a separate trial ; but having taken the charge as it was committed to him and not amended it he would now have no jurisdiction to try the accused on any other charge except S. 409 I. P. C.²⁰⁵

As to the addition of a separate and distinct charge at the commencement of the trial there seems to be some conflict of opinion. See the cases cited under Heading "*Addition of a separate charge*", *post*.

Charge caused by Extradition proceedings, Sanction, &c.—

The accused, who were subjects of the Gaekwar State, were extradited for committing dacoity in British India. The Magistrate, who held a preliminary inquiry into the matter, committed the accused to the Sessions Court on a charge under S. 398 I. P. C. The Sessions Judge amended the charge to one under S. 395 on the ground that as the accused had been extradited on a charge under S. 395, they could be tried and convicted only under that Section and no other. At the end of the trial, the Sessions Judge finding that the accused were guilty of theft, but not of dacoity, acquitted them : *Held*, reversing the order of acquittal, that it was

200. Surat Bahadur (1924) 1 O. W. N. 362 : 25 Cr. L.J. 1162 : A.I. R. 1925 O. 158 : 81 I. C. 986.

201. Ramsunder (1925) 5 P. 238 : 27 Cr. L. J. 512 : A. I. R. 1926 P. 253 : 93 I. C. 976.

202. In re Govindu (1902) 26 M. 592 : 2 Weir 297 ; Raghu (1897) Rat 915.

203. Gobardhan (1870) 4 B. L. R. App. 101.

204. Jacquet (1884) 11 C. 85 ; Poresollah (1880) 7 C. L. R. 143.

205. Lal Behary (1911) 13 C. L. J. 331 : 12 Cr. L.J. 66 : 9 I. C. 361.

competent to the Sessions Judge to alter the charge under S. 227, and, under S. 238, to convict the accused of the minor offence which the evidence established. *Held* further, that the Code of Criminal Procedure is applicable as *lex fori*.²⁰⁶ When a person is kidnapped in British India and is shoed and beaten at a place within Nepal territory, and the Political Officer at Nepal grants a certificate under S. 188 Cr. P. C., with respect to the charge of kidnapping under S. 363 I. P. C., and the accused is acquitted of the charge of kidnapping but is convicted of an offence under S. 355 I. P. C.: *Held*, that the Magistrate has jurisdiction to convict on that charge. The certificate granted under S. 188 in respect of certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain, and the Magistrate is not restricted to the Section mentioned in the certificate.²⁰⁷ A Court, convicting an accused person under the Explosive Substances Act (VI of 1908) on a consent given under S. 7, may convict him of an offence under a Section of the Act even different from what the consenting authority mentions in the order of consent, provided that the facts stated in the consent order and those upon which the conviction is based are the same. S. 230 Cr. P. C. fully authorises such a procedure.²⁰⁸ The Local Government granted sanction for the prosecution of one of its servants of an offence under S. 161 I. P. C., "or any other Section of the Code that may be found to be applicable in respect of the offence briefly described in the schedule annexed." The Court at first framed a charge under S. 165 I. P. C., but at a subsequent and much later stage added a charge under S. 161 I. P. C. On the addition of the charge, the accused was given an opportunity of recalling the witnesses and he actually did recall some of them: *Held*, that the accused was in no way prejudiced by the addition of the charge, and that the proceedings of the Court were in no sense void or without jurisdiction.²⁰⁹ A sanction to prosecute for forgery and cheating by the forged document (Ss. 468 and 417 I. P. C.), may support a charge, on the same facts, of abetment of forgery in order to cheat thereby.²¹⁰ On a direction under S. 476 Cr. P. C., to prosecute under S. 211 I. P. C., a commitment under S. 193 on the same facts is legal.²¹¹

Alteration or addition of a charge for an offence for which complaint is necessary.—

A charge of adultery cannot be added to one of rape for which the accused was committed, and the fact that the husband appeared as a witness for the offence of rape cannot be regarded as amounting to the institution by him of a complaint for adultery.²¹² S. 230 of the Code is not applicable to a case under S. 196 Cr. P. C., which requires a complaint. A conviction under S. 497 I. P. C., on a charge under S. 376 I. P. C., is illegal without the complaint

206. Khoda Uma (1892) 17 B. 369.

207. Krishna (1911) 33 A. 514; 8 A. L. J. 525; 12 Cr. L. J. 359; 10 I. C. 959.

208. Amar Singh (1919) 21 Cr. L. J. 230; 55 I. C. 102 [following Girdhari Lal (1911)] 12 Cr. L. J. 217; 10 I. C. 156; Profulla (1903) 30 C. 905; 7 C. W. N. 494.

209. Girdhari Lal (1911) 12 Cr. L. J. 217; 10 I. C. 156.

210. Profulla (1903) 30 C. 905; 7 C. W. N. 494.

211. In re Govindu (1902) 26 M. 592; 2 Weir 297.

212. Chemon Garo (1902) 29 C. 415; 6 C. W. N. 677 [following Kallu (1882) 5 A. 233].

of the husband.²¹³ The addition of a charge under S. 498 I. P. C., to the original charges under Ss. 363 and 365 I. P. C., after the close of the defence, is contrary to Ss. 199 and 238 of the Code.²¹⁴

Striking out one of the charges when the joint trial was found illegal.—

A Magistrate framed charges under Ss. 352 and 504 I. P. C., and tried the accused. Subsequently, finding that the offences were committed at different times and consequently there was a misjoinder of charges, he, instead of starting fresh inquiries in respect of the two offences, *i.e.*, separate inquiries, one in respect of S. 352 and one in respect of S. 504, struck out the charges framed already and framed a charge under S. 504 and asked the accused whether the prosecution witnesses were to be recalled and examined and whether he had any defence witnesses to examine, and the accused having stated that he did not want to examine witnesses, the Magistrate convicted him under S. 504 I. P. C. *Held*, that the procedure was illegal and that the conviction must be set aside.²¹⁵ When an accused person is charged at the same trial with falsification of four different documents, the trial is illegal and the illegality cannot be cured by striking out one of the charges and retaining charges only in respect of three falsifications.²¹⁶

Alteration of a charge which is compoundable.—

Where the Court has drawn up a charge for an offence compoundable without the permission of the Court, and this charge having been read and explained to the accused has been pleaded to, that Court should, upon a presentation of a petition of composition, at once accept the petition and acquit the accused and has no power, under S. 227 Cr. P. C., to alter the charge already drawn up.²¹⁷

Alteration of the charge at the time of delivering judgment.—

When a person was prosecuted under S. 34 of the Police Act (V of 1861) for causing obstruction to the public, but the Magistrate, finding that the accused's act did not come under that Act, convicted him on a charge of nuisance under S. 290 I. P. C., and this alteration of the charge was introduced by the Magistrate in his judgment at the very last moment, it was held that under S. 227 of the Code, any alteration in the charge should be read out and explained to the accused and the accused should know what he is charged with and what offence

213. *U. Nyan Nein Da* (1926) 4 R. 131, 133 : 27 Cr. L. J. 1075 : A. I. R. 1926 R. 169 : 97 I. C. 51.

214. *Isap* (1906) 31 B. 218 : 5 Cr. L. J. 164 [See cases noted under Heading "*Addition of a separate charge*", post.]

215. *Krishnamurthi v. Narayanaswami* (1925) 49 M. L. J. 93 : 26 Cr. L. J. 1618 : A. I. R. 1925 M. 1065 : 90 I. C. 914.

216. *Fiezma'rice* (1926) 27 Cr. L. J. 793 : A. I. R. 1926 L. 193 : 95 I. C. 393 ; *Manavala* (1906)

29 M. 569 : 17 M. L. J. 219 : 5 Cr. L. J. 479.

217. *Hasta* (1914) 29 P. R. 1914 (Cr.) (F. B.) : 16 Cr. L. J. 81 : 26 I. C. 993 [referring to *Kasum Bewa v. Bichu Bewa* (1899) 3 C. W. N. 322 ; *Mahomed Ismail v. Faizuddi* (1899) 3 C. W. N. 548 and *Mir Ahwal v. Mahomed Askari* (1902) 29 C. 726 (F. B.) : 6 C. W. N. 633 and distinguishing *Asmal Hasan* (1902) 4 Bom. L. R. 718 and *Hira Singh* (1907) 16 Cr. L. J. 336.]

he has to answer ; that S. 237 must be read with S. 227 and applied only to cases where it is doubtful which of several offences the facts will constitute, that in the present case it was not doubtful whether an offence under S. 34 of the Police Act or under S. 290 I. P. C. was committed, and that the conviction, therefore, was illegal.²¹⁸ But when the Magistrate found that the *Kalai* that was cut and taken away was unripe and though the accused were charged with an offence under S. 379 I. P. C., they were convicted under S. 426 I. P. C. : *Held*, that there was no prejudice and the conviction was sustainable.²¹⁹ (The case would fall under S. 237 of the Code). A Court may alter the charge at any time before judgment is pronounced and the discretion conferred by statute cannot be whittled away by rulings.²²⁰ If in a criminal trial the Court alters the charge so as to make it one of an offence different in nature from that set out in the original charge-sheet, it would have no jurisdiction to convict the accused without calling on him to answer the charge and without taking the opinion of the assessors as has been provided for in S. 227 Cr. P. C. But if the offence of which the accused is found guilty does not differ in nature from the offence with which he has been charged, as where the accused is charged with offences under Ss. 395 and 397 I. P. C., and is found guilty of the offences under Ss. 458 and 459 I. P. C., the case is fully covered by S. 237 Cr. P. C., and it is not necessary to alter the charge and follow the procedure laid down in S. 227 of the Code.²²¹

Addition of separate charges.—

Under Ss. 226 and 227 of the Code, the Sessions Judge has power to add a charge for any offence, different from that specified by the Committing Magistrate, disclosed in the evidence recorded before the Magistrate or at the trial by itself, subject only to the consideration of prejudice to the accused.²²² A Sessions Judge has power to try any offence under the Indian Penal Code (S. 28) ; and although under S. 193 Cr. P. C., a Court of Session cannot take cognizance of any offence as a Court of original jurisdiction, regard must be had to the exception contained in the words "except as otherwise expressly provided in this Code."²²³ So long as the facts appearing in the Magisterial inquiry warrant the framing of the charge omitted by the Committing Magistrate, the Sessions Court has the power to add the charge so omitted. It is not quite correct to say that the Sessions Court is not a Court of original jurisdiction. It has original jurisdiction which it can exercise on commitment made by a

218. Raghunath (1925) 24 A. L. J. 168 : 27 Cr. L. J. 152 : A. I. R. 1926 A. 227 : 91 I. C. 888 [following Dhum Singh (1925) 23 A. L. J. 436 : 26 Cr. L. J. 1057 : A. I. R. 1925 A. 448 : 83 I. C. 1].
 219. Kalachand v. Tatu (1929) 50 C. L. J. 285 : 31 Cr. L. J. 474 : A. I. R. 1929 C. 773 : 123 I. C. 243.
 220. Subramania (1931) 1931 M. W. N. 399 : 32 Cr. L. J. 756 : A. I. R. 1931 M. 439 : 131 I. C. 461 [relying on Hume v. Poreh (1913) 41 C.

734 (S. B.) : 19 C. W. N. 593 : 15 Cr. L. J. 49 : 22 I. C. 324.]
 221. Gulab Singh (1935) 1935 A. L. J. 843 : 36 Cr. L. J. 1294 : A. I. R. 1935 A. 458 : 158 I. C. 38.
 222. Dodo (1915) 9 S. L. R. 37 : 16 Cr. L. J. 573 : 26 I. C. 641 ; Gulzari (1933) 10 O. W. N. 738 : 35 Cr. L. J. 63 : A. I. R. 1933 O 375. 146 I. C. 424.
 223. Dodo (1915) 9 S. L. R. 37 : 16 Cr. L. J. 573 : 26 I. C. 641.

Magistrate.²²⁴ But S. 226 cannot be applied with reference to additional evidence taken under S. 219 of the Code.²²⁵ When the Committing Magistrate had framed charges relating to the murder of one person and hurt to another person who also died as a result of the injuries received in the assault, and the Sessions Judge added charges relating to the murder of this other person also ; *held*, that as the added charges had reference to the immediate subject of the prosecution and committal, such addition was within the powers of the Sessions Judge.²²⁶

If, on a commitment under Ss. 147 and 304, 325 and 323 read with S. 149 I. P. C., the evidence before the Magistrate establishes hurt caused personally, or abetment thereof, counts for such latter offences should be added.²²⁷ When the husband's complaint stated offences under Ss. 344 and 366, and also Ss. 497 and 498, but the commitment was under the former Sections, charges for the latter offences may be added.²²⁸ But a contrary decision has recently been made that a charge under Ss. 497 and 498 I. P. C., cannot be added by the Sessions Judge to a charge under S. 366 I. P. C. ; S. 226 of the Code does not provide the Sessions Judge with a power to make such additions in the existing charges because the illustrations to the Section show that such additions or alterations can be made only where the added or altered charges can be supported by the evidence relevant to the charges already framed.²²⁹ The Court can only amend or add charges with reference to the immediate subject of prosecution and committal, and not as to a matter not covered by the indictment. Upon a prosecution and commitment for forgery of a document, a charge of attempt to cheat by means of it is illegal, the transactions being distinct and separate.²³⁰ The addition to the original charge under S. 202 I. P. C. of one under Ss. 109 and 201 I. P. C., of which there was no evidence in the preliminary inquiry, was held *ultra vires* ; the record ought to have been returned by the Judge for inquiry into the latter offence.²³¹ When new heads of charges are proposed to be added before the Sessions Judge, the fact that a complaint regarding them was made to and dismissed by a Magistrate is no bar to the Sessions Judge's adding them.²³²

It is doubtful if S. 227 intended to confer jurisdiction on a Sessions Court to add or substitute a new charge on fresh evidence led or to be led in the Sessions Court for the first time.²³³ Besides asking for an amendment of charges, which is likely to prejudice the prisoner,

224. Mula Singh (1922) 24 Cr. L. J. 177 ; A. I. R. 1924 L. 413 ; 71 I. C. 593.

225. In re Bhogi Reddi (1932) 1932 M.W.N. 1162 ; 34 Cr. L. J. 278 ; A. I. R. 1933 M. 247 ; 142 I.C. 138. *See also* Sukee Raur (1893) 29 C. 97.

226. Hassenulla Sheikh (1923) 28 C. W. N. 561 ; 26 Cr. L. J. 5 ; A. I. R. 1924 C. 625 ; 83 I. C. 485 [approving Gordon (1887) 9 A. 525 ; distinguishing Birendra (1904) 32 C. 22 : 8 C. W. N. 784 ; 1 Cr. L. J. 794 and holding obsolete Appa Subhana (1884) 8 B. 200 and Kharga (1886) 8 A. 665 ; 6 A. W. N. 254].

227. Panchu (1907) 34 C. 698 ; 11 C. W. N. 666 ;

5 Cr. L. J. 427 [following Ram Sarup (1901) 6 C. W. N. 98].

228. Rajani v. Idris (1921) 48 C. 1105, 1108 ; 25 C. W. N. 615 ; 34 C. L. J. 51 ; 22 Cr. L. J. 760 ; 64 I. C. 280.

229. Abdul Aziz (1931) 53 C. L. J. 346 ; 32 Cr. L. J. 1135 ; A. I. R. 1931 C. 524 ; 134 I. C. 314.

230. Birendra (1904) 32 C. 22 : 8 C. W. N. 784 ; 1 Cr. L. J. 794.

231. Rama Varma Raja (1881) 3 M. 351 ; 2 Weir 269.

232. Vajiram (1892) 16 B. 414.

233. Stewart ('926) 27 Cr. L. J. 1217 ; A. I. R. 1927 S. 28 ; 97 I. C. 1041.

it is always open to the Crown to have the prisoner acquitted on the original charges and to have him charged anew before a Magistrate according to new facts.²³⁴ The fact that the Public Prosecutor might have examined witnesses had he not been of opinion that they had been tampered with is not a reasonable ground for adding a charge of conspiracy to a charge of an offence under S. 314 I. P. C., in the absence of any evidence of such a conspiracy.²³⁵ A charge under S. 120-B I. P. C., after stating that the object of the conspiracy was to commit an offence under S. 409 I. P. C., added "and to do any act which may serve to conceal the said offence and prevent its detection": *Held*, that the commission of specific offences under Ss. 467 and 477 I. P. C., could not be imported into the charge, as the object of the conspiracy, as to the specific mode of preventing detection, was not in contemplation of the conspirators at the outset.²³⁶

S. 227 permits only alteration or addition of charges, but not a joint trial otherwise bad for misjoinder.²³⁷ Exercise of a sound discretion is obligatory in adding new charges under Ss. 227-229.²³⁸ The Court has large powers of amendment and addition.²³⁹ Under the Codes of 1861 and 1872, it was held that the new charge proposed to be added should be cognate to offences charged (*See* the notes under the Heading "*Previous History*," *ante*). But it has been observed under the present Code that the addition of a charge under S. 477A I.P.C. to the charge under S. 409 I. P. C. (which are not cognate offences) is not absolutely illegal.²⁴⁰ A charge under S. 395 read with S. 511 I. P. C., can be added to one under S. 395 read with S. 116 I. P. C., at any time before judgment.²⁴¹ A Judge can alter or amend a charge at any stage of the trial before judgment, verdict or opinions of the assessors.²⁴² The addition of a charge under S. 498 I. P. C. to the original charges under Ss 363 and 365 I. P. C., after the close of the defence, is contrary to Ss. 199 and 238 of the Code.²⁴³ The addition of a fresh charge of previous conviction, at the close of the case, is unwarranted.²⁴⁴

Addition of charges by Appellate Court.—

The addition of S. 143 I. P. C., by the Appellate Court to the charges under Ss. 426 and 451 I. P. C., is not permissible, as such addition would have the effect of imposing a constructive responsibility for individual acts of all persons who were members at the time of the assembly, whereas it would be necessary to prove the guilt of each of the persons charged for his individual acts if the charges were only under Ss. 451 and 426 I. P. C.²⁴⁵

234. Stewart (1926) 27 Cr. L. J. 1217 : A. I. R. 1927 S. 28 : 97 I. C. 1041. *See also* Govindas Haridas (1869) 6 B. H. C. R. 76.

235. Wahid Bux (1929) 30 Cr. L. J. 1121 : A. I. R. 1929 S. 250 120 : I. C. 81.

236. *In re Hanumantha* (1933) 57 M. 545 : 35 Cr. L. J. 631 : A. I. R. 1934 M. 88 : 148 I.C. 281.

237. *Krishnamurthi v. Narayanaswami* (1925) 49 M. L. J. 93 : 26 Cr. L. J. 1618 : A. I. R. 1925 M. 1065 : 90 I. C. 914.

238. Mathura (1901) 6 C. W. N. 72.

239. Birendra (1904) 32 C. 22 : 8 C. W. N. 784 : 1 Cr. L. J. 794.

240. *Mati Lal* (1899) 26 C. 560 : 3 C. W. N. 412.

241. *Anant* (1900) 25 B. 90 : 1 Bom. L. R. 653.

242. *Mathura* (1901) 6 C. W. N. 72.

243. *Isap* (1906) 31 B. 218 : 5 Cr. L. J. 164 [referring to *Bangaru Asari* (1903) 27 M. 61 : 2 Weir 236 ; *Kalu* (1882) 5 A. 233 : 3 A. W. N. 1.]

244. *In re Bal Gangadhar* (1908) 33 B. 221, 225 : 9 Cr. L. J. 226 : 2 I. C. 277.

245. *In re Mukka* (1915) 16 Cr. L. J. 737 : 31 I. C. 337 (M).

Amendment of charge.—

When a Magistrate amends the charge he should not write over the original charge but should have it on the file for reference, if necessary, and should write the new charge separately and correctly date it.²⁴⁶

Amendment of charge after the expression of the opinion of the assessors.—

The accused was one of a party of burglars who invaded the house of M, robbed his widow, ransacked his house, and on his seizing the accused as he was escaping, a scuffle ensued and the latter dealt him a blow with a spear-head. The accused was tried by a Court of Session under S. 460 I. P. C. But after the assessors had given their opinion to the effect that the accused was caught in the house of M in the act of committing burglary and struck him a blow from which he died, the Sessions Judge recorded an order to the effect that the accused should have been charged under S. 302 I. P. C., as well as under S. 460 I. P. C., and amending the charge, under S. 227 Cr. P. C., convicted the accused under S. 302 I. P. C. : *Held*, that the alteration of the charge by the Sessions Judge after the assessors had given their opinion was illegal ; *held* further, that the accused was guilty under S. 460 but not S. 302 I. P. C.²⁴⁷

Prejudice to the accused for alteration of a charge.—

The addition of a charge under S. 498 I. P. C., involving the question of marriage, after the close of the defence, to charges under Ss. 363 and 366 I. P. C., is prejudicial and irregular.²⁴⁸ Where the date of the offence was altered on proof of *alibi*, to support a new theory and not to correct a mere error, the conviction was set aside.²⁴⁹ The addition of a new charge of dacoity, shortly before the conclusion of the defence, without adjournment, is improper though no objection is taken.²⁵⁰ Whenever an amendment of the charge in any way tends to prejudice the prisoner, steps should be taken to prevent that consequence arising by ordering a new trial or suspending the trial going on, to enable him to make his defence, or to examine any material witness, or to recall any witness already examined ; the same principle extends to all instances of material prejudice arising to any one under trial from an amendment made in the course of proceedings. It is only in the case of charges closely related that a trial goes on forthwith after an amendment, and the trial might, without any unfairness, be deemed, for the reception of evidence and all other purposes, to have been a trial on the amended charge from its commencement.²⁵¹ A prisoner is said to be prejudiced when he is unfairly affected as to his defence on the merits.²⁵²

246. *Nga Pan* (1914) 16 Cr. L. J. 2 : 26 I. C. 306 ; *Jagdeo Parshad* (1920) 18 A. L. J. 442, 444 : 21 Cr. L. J. 410 : 56 I. C. 58.

247. *Harbans* (1916) 17 Cr. L. J. 454 : 36 I. C. 134 (Lah.).

248. *Isap* (1906) 31 B. 218 : 5 Cr. L. J. 164. *See also Abdul Aziz* (1931) 53 C. L. J. 346 : 32

Cr. L. J. 1135 : A. I. R. 1931 C. 524 : 134 I. C. 314.

249. *Govinda* (1909) 13 C. W. N. cclxxxii.

250. *Mathura* (1901) 6 C. W. N. 72, 78.

251. *Govind* (1874) 11 B. H. C. R. 278.

252. *Deva Dayal* (1874) 11 B. H. C. R. 237.

Recalling of witness after addition or alteration of charge—S. 231 Cr. P. C.

Under S. 231 Cr. P. C., it is imperative that a Court, when it alters or adds to a charge after the commencement of the trial, should allow the prosecutor and the accused to re-call or re-summon and examine with reference to such alteration or addition, any witness who may have been examined and also to call any further witness whom it may think to be material.²⁵³ Accused was originally tried under S. 324 I. P. C., and after the evidence for the prosecution a charge under that Section was framed. After the evidence for the defence was concluded the trying Magistrate altered the charge into one under S. 307 I. P. C., and, without giving the accused an opportunity to re-examine the witnesses for the prosecution in regard to the altered charge or to produce such further evidence as he might have in his defence on that charge, committed him to the Court of Session for trial on the charge so altered: *Held*, that the procedure of the Magistrate was entirely illegal and was likely to prejudice the accused in his trial before the Court of Session, and the order of commitment must be set aside.²⁵⁴ When a charge is amended, the accused has a right, under S. 231 of the Code, to recall and examine with reference to the amendment any witness who had been examined already and it is wrong to restrict his right to the examination of only those witnesses on the basis of whose evidence the charge had been amended.²⁵⁵ The provisions of S. 231 are not inapplicable to cases where, under S. 228 of the Code, the trial is immediately proceeded with. The accused has the right to recall prosecution witnesses, even if the alteration in the charge could not affect his defence, and the Magistrate has no discretion in the matter.²⁵⁶ When a charge is altered, the accused is entitled to have his new witnesses examined, unless the Magistrate thinks that application for the examination of such witnesses is made for the purpose of vexation or delay or for defeating the ends of justice, in which case it is essential that he must record the grounds.²⁵⁷ When a charge is amended under S. 227 Cr. P. C., then under S. 231 there is the right of re-calling witnesses. In general that procedure exists and where it is necessary that a charge should be amended, then such a right is allowed. There are, however, certain cases in which it is not necessary to amend the charge and a conviction can be made without a charge for the offence of which there is a conviction; thus when the conviction is for a minor offence [S. 238 (2)]. So, when the charge is of rape and the conviction is of abetment of rape without amending the original charge, the conviction is not rendered invalid.²⁵⁸ It is no duty of the Court to ask accused if he wishes to recall or re-examine any witness; it is essential that the

253. Harbans (1916) 17 Cr. L. J. 454 : 36 I. C. 134 (Lah.); Nagendra (1932) 36 C. W. N. 542 : 55 C. L. J. 111 : 33 Cr. L. J. 265 : A. I. R. 1932 C. 486 : 136 I. C. 136.

254. Mohan Lal (1924) 22 A. L. J. 239 : 25 Cr. L. J. 798 : A. I. R. 1924 A. 665 : 81 I. C. 318.

255. Harihar Singh (1924) 26 Cr. L. J. 1498 : A. I. R. 1926 P. 182 : 90 I. C. 154.

256. In re Ramalinga (1928) 52 M. 346 : 30 Cr. L. J. 223 : A. I. R. 1929 M. 200 : 113 I. C. 672 : Chhanka Dhanuk (1927) 6 P. 832 : 28 Cr. J. 769 : A. I. R. 1927 P. 398 : 104 I. C. 97.

257. Ramalinga v. Ramaswamy (1929) 57 M. L. J. 478 : 31 Cr. L. J. 455 : 122 I. C. 785.

258. John (1935) 1935 A. L. J. 1079 : 37 Cr. L. J. 247 : A. I. R. 1935 A. 935 : 160 I. C. 163.

accused should ask for permission.²⁵⁹ S. 231 applies only to the alteration of a charge after the commencement of the trial. Proceedings in a Magistrate's Court must be held to be proceedings in an inquiry under Ch. XVIII and not proceedings in a trial, as soon as the Magistrate decides under S. 347 to commit the accused for trial in the Court of Session.²⁶⁰ Amendment directed by the High Court involves the duty mentioned in S. 231.²⁶¹

Power of the High Court or the Appellate Court when accused is misled by absence of a charge or by an error in the charge—S. 232 Cr. P. C.

If the Chief Court thinks that in consequence of material error in a charge, the accused has been misled, it is bound to direct a new trial to be had upon a charge framed in the proper manner.²⁶² A Court of Appeal or Revision would always be slow to interfere with the exercise of discretion vested in the lower Court under S. 227 Cr. P. C. to allow amendment of a charge, and would not interfere unless such discretion has been perversely or arbitrarily exercised.²⁶³

S. 232 applies to all cases in which the accused was misled, including cases in which the conviction was in compliance with the terms of the law, and not merely to cases in which the conviction was irregular.²⁶⁴

In a charge framed under S. 498 I. P. C., against the accused in the trial Court, it was alleged that he had taken the woman away from the complainant's custody, but the nature of the evidence showed that the charge was intended to relate to the alleged taking away of the complainant's wife from one B's house. There was, however, no finding that B had the care of the woman on behalf of her husband, the complainant, nor was there any evidence on the record that would justify such a finding. *Held*, that from the scanty nature of the evidence connecting the accused with the offence, it would not be proper to order a retrial on an amended charge.²⁶⁵

There is an irregularity when the offences of kidnapping and abduction have been included in one head under one charge; but when such irregularity has not resulted in any prejudice to the accused, it does not amount to a material error within the meaning of S. 232 and is condoned by S. 537 Cr. P. C.²⁶⁶

259. Konmal (1922) 52 A. 455 : 32 Cr. L. J. 22 : A. I. R. 1930 A. 215 : 127 I. C. 587.

260. Ram Ghulam (1931) 53 A. 692 : 32 Cr. L. J. 849 : A. I. R. 1931 A. 434 : 132 I. C. 47.

261. Kashi v. Damu (1921) 27 C. W. N. 28 : 25 Cr. L. J. 524 : 77 I. C. 988.

262. Harbans (1916) 17 Cr. L. J. 454 : 36 I. C. 134.

263. Stewart (1926) 27 Cr. L. J. 1217 : A. I. R. 1927 S. 28 : 97 I. C. 1041.

264. Mallu Gope (1929) 10 P. L. T. 875 : 30 Cr. L. J. 891 : A. I. R. 1929 P. 712 : 118 I. C. 113.

265. Sunnat v. Makar (1929) 31 Cr. L. J. 697 : A. I. R. 1930 C. 138 : 124 I. C. 520.

266. Allahrakhio (1934) 36 Cr. L. J. 231 : A. I. R. 1934 S. 164 : 152 I. C. 1061.

Ss. 237 and 238 Cr. P. C.

The prisoner was charged only under S. 302 I. P. C. The Judge told the Jury that their duty, after considering the question of provocation, was only to acquit or convict of the charge of murder : this direction was wrong. The Judge should have drawn their attention to S. 238 Cr. P. C. If the Jury found, as a fact, that the person killed had given grave and sudden provocation so as to deprive the prisoner of the power of self-control they, as judges of the facts, had a right, where the only charge was murder, to find a verdict of culpable homicide.²⁶⁷ The effect of S. 238 Cr. P. C., is to invest a Jury trying an offence with authority to find, as an incident to such trial, that certain facts are proved which constituted only a minor offence, though such minor offence be not triable by Jury.²⁶⁸ Two persons along with others were charged under S. 149 read alternately with Ss. 302, 304 and 325 I. P. C., that is, with being members of an unlawful assembly at a time when (1) murder, or (2) culpable homicide not amounting to murder or (3) grievous hurt, was caused by some members of that assembly in prosecution of its common object. The Jury absolutely acquitted all except these two men whom they unanimously found guilty only under S. 325 I. P. C. The Judge requested the Jury to reconsider their verdict, as there was no charge under that Section. *Held*, that the Judge was wrong in doing so. The requirements of the law are satisfied if, in returning their verdict, the Jury returns a verdict of conviction of a minor offence forming part of one of the charges.²⁶⁹ On a charge under S. 366 I. P. C., the Judge should have left to the Jury, in case the intent specified in the charge, viz. in order that the girl might be seduced or forced to illicit intercourse, be not found by them, to find the accused guilty of the minor offence under S. 361 I. P. C.²⁷⁰ In a case under Ss. 147, 366 and 498 I. P. C., the Judge can, even in the absence of a charge under S. 341 and S. 352 I. P. C., ask the Jury to convict under S. 147, by inviting them to consider whether an offence under S. 341 or S. 352 had or had not been committed, because the offence under the latter Section is involved in the charge under Ss. 366 and 498 I. P. C.²⁷¹ The omission to instruct the Jury as to their verdict, if they found that there was no unlawful assembly but that hurt was caused by any one or more of the accused, is a serious misdirection.²⁷²

As to cases illustrating the power of the Jury to convict for offences for which no charge has been framed, see Notes under Heading "*Verdict on charges not framed*" in Chap. VIII. of Part II, *ante*.

S. 288 Cr. P. C.

The correct way of charging the Jury as regards to the evidence of a witness whose statements before the Court and before the Committing Magistrate were contradictory to each

267. Devji Govindji (1895) 20 B. 215.

268. Pattikadan (1902) 26 M. 243, 243 : 2 Weir 463.

269. Mahaddi (1880) 5 C. 871. See in this connection Dasarath (1907) 34 C. 325 : 5 Cr. L. J. 424 ; Ram Sarup (1901) 6 C. W. N. 98.

270. Hughes (1891) 14 A. 25 : 11 A. W. N. 170.

271. Torap Ali (1926) 53 C. 599 : 44 C. L. J. 239 : 27 Cr. L. J. 1314 : A. I. R. 1926 C. 1059 : 98 I. C. 386.

272. Panchu (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

other, is to leave it to the Jury to consider the contradictions and whether they would believe the witness.²⁷³ The Judge ought to tell the Jury that the evidence of witnesses who have retracted their statements to the Committing Magistrate should be regarded with great caution. A direction that it was clear that such witnesses have altered their evidence as far as possible to secure the acquittal of the accused, does not leave them an option to accept the evidence given before the Committing Magistrate or that given at the trial, and is therefore a misdirection vitiating the charge.²⁷⁴

Though the Judge has a discretion to put in depositions given before the Committing Magistrate, yet a damaging deposition, that would seriously prejudice the case of the accused as not having been subjected to cross-examination, ought not to be put in for the first time before the Jury.²⁷⁵

S. 342 Cr. P. C.

As to the law on this subject, see Notes under Heading "*Examination of the accused*" in Part II, Chapter VI, *ante*.

Under the Code of 1861 it was held that under S. 372 the accused is to be called upon to enter upon his defence and to produce his evidence and if the accused makes a statement in defence it ought to be recorded; that if he does not voluntarily make a statement and declines to answer any question put by the Court under S. 373 the fact should be noted; and that when there is nothing to show the nature of the defence, a note of the address to the Court (if any) under S. 374 should be recorded; and it was also held in a case that in that particular case the omission to make such a record did not cause any prejudice because the accused persons appeared to have severally addressed the Jury.²⁷⁶ A Sessions Judge made a remark that in criminal cases the unsupported declaration of a prisoner is entitled to some weight. The High Court observed:—"I am to remark that if the case for the prosecution be proved by evidence, the unsupported statement of a prisoner is entitled to no weight; to entitle it to weight it must be supported by evidence."²⁷⁷

A Sessions Judge had said,—“They (i.e., the prisoners tried at one trial) may be taken as witnesses for each other and the question is whether you will accept their story or that of the prosecution, and for that purpose you must compare them both, point by point. The High Court observed,—“This, we observe, is not a correct view of the law, and there can be no comparison drawn between sworn depositions of witnesses on the one hand and bare statements of prisoners on the other,—statements which they had the most direct interest in

273. Rashidazzaman (1911) 15 C. W. N. 434, 438 : 12 Cr. L. J. 193 : 10 I. C. 684.

274. Abdul Gani (1925) 53 C. 181, 190 : 42 C. L. J. 205 : 26 Cr. L. J. 1577 : A. I. R. 1926 C. 235 : 90 I. C. 537.

275. Khadem (1929) 57 C. 940 : 32 Cr. L. J. 180 : A. I. R. 1930 C. 706 : 128 I. C. 801.

276. Golam Hajjam (1871) 15 W. R. 16.

277. Criminal Letter No 254, dated 23rd February 1867 : 7 W. R. Cr. Lett. 2.

making and which, if credited, would have the effect of absolving the makers from the offence charged against them. Such statements were altogether inadmissible; they were no evidence at all, and the Judge ought not to have alluded to them as evidence.²⁷⁸

The record of the examination of the accused is obligatory under S. 364 of the present Code.²⁷⁹ By not conforming to the provisions of Ss. 364 of the Code the Judge deprives the accused person of a valuable right and also deprives himself and the Jury of the opportunity of drawing such inferences from his refusal or answers as they think just, which they are entitled to do under S. 342 Sub-sec (2).²⁸⁰ In a case tried with the aid of a Jury the Judge should examine the accused with care so that the defence or its hollowness, where it is untenable, may be fully impressed on the minds of the Jury.²⁸¹

A Judge should warn the Jury that the statement of an accused not amounting to a confession cannot be considered against a co-accused.²⁸² Omission in this respect is a material misdirection, fatal to the trial, even though the Judge deals separately with the evidence against each accused, and in doing so did not refer to such statements as evidence against each of them.²⁸³ If there are no directions on the statements of the co-accused the conviction should be quashed.²⁸⁴

In a certain case the question was whether the prisoner had filed two documents knowing or having reason to believe that the date of a certain decree had been altered to 1872. The prisoner's original defence was that the alteration had been made, after the filing in the Sherista, by the amlahs or the judgment-debtor. In the Sessions Court, for the first time, the prisoner stated that the judgment-creditor may have sent him the decree thus altered. As regards the first defence the Sessions Judge said to the Jury.—"If you are satisfied that Col. 3, has not been altered and that the same hand wrote 1872, then it is clear that 1872 is not the *true* date of the decree and that the prisoner wrote that *untrue* date," etc. The High Court said that the use of this words 'true' and 'untrue' at that stage of the charge was not accurate, and that the Judge should have said 'correct' and 'incorrect' instead of 'true' and 'untrue' and they also pointed out that the original decree had not been produced and there

278. Bhekoo Sing (1867) 7 W. R. 72.

279. Nani (1924) 52 C. 403 : 41 C. L. J. 50 : 26 Cr. L. J. 761 : A. I. R. 1925 C. 575 : 86 I. C. 345 ; Sarat (1924) 52 C. 446 : 26 Cr. L. J. 1244 : A. I. R. 1925 C. 821 : 88 I. C. 860.

280. Nani (1924) 52 C. 403 : 41 C. L. J. 50 : 26 Cr. L. J. 761 : A. I. R. 1925 C. 575 : 86 I. C. 345.

281. Mohammad Shafi (1925) 26 Cr. L. J. 1576 : A. I. R. 1926 O. 57 : 90 I. C. 536.

282. Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213 : 27 C. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321 ; Mahommed Yunus (1922) 50 C. 318 : 25 Cr. L. J. 467 : A. I. R. 1923 C. 517 : 77 I. C. 819 ; Topandas (1923) 25 Cr. L. J.

761 : A. I. R. 1925 S. 116 : 81 I. C. 249 ; Bikram Ali (1929) 57 C. 811 : 50 C. L. J. 467 : 31 Cr. L. J. 610 : A. I. R. 1930 C. 139 : 124 I. C. 66.

283. Shek Miya (1869) 6 B. H. C. R. 10 ; Taju Pramanik (1898) 25 C. 711 : 2 C. W. N. 369 ; Sourendra (1905) 10 C. W. N. 153 : 3 Cr. L. J. 144.

284. Altschuler (1915) 11 Cr. A. R. 243 ; Ashworth (1911) 8 Cr. A. R. 256 ; Ashdown (1916) 12 Cr. A. R. 34 ; Johnson (1910) 6 Cr. A. R. 82 ; Schoffield (1917) 12 Cr. A. R. 192 ; Gaham (1919) 14 Cr. A. R. 7 ; Mathews (1919) 14 Cr. A. R. 23.

was no evidence to show what the correct date was. As regards the second defence the Judge had told the Jury,—“If this were the true answer why did he not say so from the first? And why now does he hesitate to say that he wrote the figure 2 himself from the decree as he then found it? It is reasonable to expect an innocent party to explain suspicious circumstances at once if he can,” etc. The High Court set aside the verdict, holding that in the charge the learned Judge attributed an undue importance to the statements or excuses made by the prisoner.²⁸⁵

The prisoner, when before the Magistrate, on the usual statutory formula concluding with the words “Do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so,” etc., being read out to him at the close of the case from prosecution, said, “I do not wish to say anything except that I am innocent.” The fact that the prisoner had not disclosed the defence on that occasion was adversely commented on by the Judge. *Held*, that the comment on the failure to make further statement were improper.²⁸⁶

Statements made by the accused in answer to questions put by the Committing Magistrate under S. 364 Cr. P. C., which questions were not put to enable any circumstance appearing in evidence against him, are wholly inadmissible, and the Judge should point out to the Jury that it was so. Where, instead of doing so, the Judge draws the attention of the Jury to those statements, that seriously prejudices the accused and so the trial is vitiated.²⁸⁷ Where the Judge had failed to invite the Jury to consider carefully what each of the accused said in his statement with reference to the charges framed against him and failed to point out to the Jury the attitude to be taken towards a retracted confession as evidence against co-accused : *Held*, that the verdict must be set aside and retrial ordered.²⁸⁸ The statement of the accused under S. 342 Cr. P. C., amounted only to an assertion of innocence and an explanation of how he made the retracted confession. The Judge omitted to put the statement to the Jury, but the language used by the Judge was such that the Jury must have throughout appreciated perfectly well what the accused's defence was and the reasons for which he maintained that the Jury should disregard the confession made by him. Under the circumstances, it was held, that no harm was done by the Judge's omission to deal specifically with the statement of the accused.²⁸⁹

When written statements are filed on behalf of the accused, the attention of the Jury should be drawn to their contents. In a case in which the Sessions Judge in his charge to the Jury referred to the Section of the Penal Code defining the offences and after setting out the elements necessary to constitute them, stated before them what parts of the prosecution case, if proved, constitute which of the offences and very briefly referred to the witnesses who proposed to prove which part, and as regards the accused's written statements observed : “Jury

285. Gunga Govind (1875) 23 W. R. 21.

286. Naylor (1932) 23 Cr. A. R. 177.

287. Tufani (1911) 15 C. L. J. 323 : 13 Cr. L. J. 283 : 14 I. C. 667.

288. Hemanta (1919) 47 C. 46 : 30 C. L. J. 29 : 21 Cr. L. J. 775 : 58 I. C. 455.

289. Baldeo (1932) 34 Cr. L. J. 369 : A. I. R. 1933 C. 187 : 142 I. C. 639.

said they remember it and do not wish it read through again," the High Court condemned the charge as a whole.²⁹⁰

S. 465 Cr. P. C.

Procedure in case of an insane accused.—

The question of the sanity of the accused may come up for the consideration of the Court of Session or the High Court in two ways, viz : (1) When it appears to such Court at the trial of the accused that he is of unsound mind and consequently incapable of making his defence ; and (2) when from the evidence taken in the course of the trial, it appears to such Court that the accused was of unsound mind when he committed the act which constituted the offence, though there is nothing to show that he is of unsound mind and at the time of the trial. It may well happen that the accused is of unsound mind and incapable of properly conducting his defence at the time of the trial, though he was of sound mind and responsible before the law for his actions at the time when the deed charged against him was committed. The question, therefore, whether the accused is insane at the time of the trial, is quite distinct from the question whether he was insane at the time when the offence was committed ; and the latter question can never arise pending the consideration of the former, for the former question is an issue to be tried preliminarily to the regular trial.²⁹¹ The issue to be tried in such a case is the state of the prisoner's mind at the date of the arraignment, not at any prior time.²⁹² S. 465 Cr. P. C., deals with the procedure in trying this issue. The question whether an accused person is entitled to acquittal under the general exception of insanity as defined in S. 84 I. P. C., can only arise when the procedure laid down in Ss. 464 and 465 Cr. P. C., was duly followed.²⁹³ The question is a separate one and is to be inquired into in a separate manner.²⁹⁴

Whenever it appears to the Court that the accused on trial is of unsound mind and consequently incapable of making his defence, the Jury, or the Court with the aid of assessors, shall, in the first place, try the fact of such unsoundness and incapacity and S. 465 (as amended by S. 121 of Act XVIII of 1923) requires that if the Jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case, and the Jury, if any, shall be discharged.

The accused may appear to the Court insane from his demeanour in the dock,²⁹⁵ his conduct or statements when his plea is being taken or from information received otherwise ; he may show signs of insanity during the course of the trial.²⁹⁶ The probability then arises

290. Birendra (1903) 30 C. 822 ; 7 C. W. N. 639.

291. Doorjodhun (1873) 19 W. R. 26 ; Jagdeo (1917) 15 A. L. J. 239 ; 18 Cr. L. J. 470 : 39 I. C. 310.

292. Keary (1878) 14 Cox. 143.

293. Jhabbu (1919) 42 A. 137 ; 21 Cr. L. J. 83 : 54 I. C. 483.

294. Santokh Singh (1926) 7 L. 315 : 27 Cr. L. J. 552 ; A. I. R. 1926 L. 498 : 93 I. C. 1048 ; Nabi Ahmad (1932) 9 O. W. N. 355 : 33 Cr. L. J. 542 ; A. I. R. 1932 O. 190 : 137 I. C. 800.

295. Gorde 7 A. & E. 536.

296. Radhanath (1926) 27 Cr. L. J. 896 : 44 C. L. J. 285 ; A. I. R. 1927 C. 289 : 96 I. C. 160.

that the accused may be unable to understand the proceedings. In such a case a Jury is sworn to ascertain whether the accused is "fit to plead", which means whether he is of sufficient intellect to comprehend the course of the trial so as to make a proper defence. If the accused is found not fit to plead, he is not to be tried, but he is to be detained during His Majesty's pleasure.²⁹⁷ The moment the question of insanity is raised the Judge must put it to the Jury as a preliminary issue.²⁹⁸ The Court is bound to inquire, before it begins to record evidence in the case, whether the accused is or is not incapacitated by unsoundness of mind from making his defence; if it fails to do so, the subsequent inquiry about the soundness or unsoundness of mind does not cure the defect.²⁹⁹ The question must be tried first and not during the whole of the trial.³⁰⁰ The provisions of S. 465 are mandatory.³⁰¹

The preliminary inquiry held under S. 465 (though deemed to be a part of the trial of the accused under Sub-s. 2 of S. 465), is not a trial in the sense of ascertaining whether the accused is guilty or not of the offence charged.³⁰² In this preliminary inquiry, the onus of proving the soundness of mind and capacity of the accused is on the prosecution;³⁰³ while in the regular trial, the onus of proving that the accused was insane at the time of committing the offence is on the defence.³⁰⁴ The question may be tried, aided, if need be, by medical evidence.³⁰⁵ But it is obvious that the questions which are to be put to expert witnesses in this preliminary inquiry would be quite different from those which might be put when the defence of insanity would be taken.³⁰⁶

In such preliminary inquiry the finding that the accused is insane must be arrived at by the Jury, when the trial is by Jury, or by the Judge aided by assessors, and not by the Judge himself personally;³⁰⁷ and such finding shall be recorded by the Judge. The omission to record such finding vitiates the trial.³⁰⁸

After recording such finding the Judge shall postpone further proceedings in the case, and the Jury, if any, shall be discharged. The accused may be released on bail or kept in custody as provided in S. 466 Cr. P. C., pending investigation or trial.

If, on the other hand, the Judge or the Jury find the accused capable of making his

297. Lee Keen (1915) 11 Cr. A. R. 293, 300.

298. Radhanath (1926) 27 Cr. L. J. 896 : 44 C.L.J. 285 : A. I. R. 1927 C. 289 : 96 I. C. 160.

299. Jhabbu (1919) 42 A. 137 : 21 Cr. L. J. 83 : 83 : 54 I. C. 483.

300. Niaz Ali (1905) 25 A. W. N. 2 : 2 Cr. L. J. 91 ; Santokh Singh (1926) 7 L. 315 : 27 Cr. L. J. 552 : A. I. R. 1926 L. 498 : 93 I. C. 1048 ; Radhanath (1926) 27 Cr. L. J. 896 : 44 C. L. J. 285 : A. I. R. 1927 C. 289 : 96 I. C. 160.

301. Ram Nath (1929) 31 Cr. L. J. 899 : A. I. R. 1930 A. 450 : 125 I. C. 767.

302. Ghinua Uraon (1917) 1918 P. 57 (F. B.) : 19 Cr. L. J. 135 : 43 I. C. 423.

303. Shib Das (1924) 51 C. 584 : 25 Cr. L. J. 1051 : A. I. R. 1924 C. 713 : 81 I. C. 827 : Gopi Mohan (1924) 51 C. 827 : 26 Cr. L. J. 276 : A. I. R. 1925 C. 479 : 84 I. C. 340 ; Bahadur (1927) 9 L. 371 : 29 Cr. L. J. 204 : A. I. R. 1928 L. 796 : 106 I. C. 796.

304. S. 105 Evidence Act ; S. 84 I. P. C. ; Jhabbu (1919) 42 A. 137, 141 : 21 Cr. L. J. 83 : 54 I. C. 483.

305. In re Pisari (1886) 2 Weir 137, 139.

306. Doorjodhun (1873) 19 W. R. 26, 27.

307. Bheekoo (1873) 19 W. R. 15.

308. Jhabbu (1919) 42 A. 137 : 21 Cr. L. J. 83 : 54 I. C. 483.

defence, the trial shall proceed and the onus is then on the accused to prove unsoundness, within S. 84 I. P. C., on the date of the offence.³⁰⁹

Sub-s. (2) of S. 465 is merely an enabling enactment giving the Court, which should subsequently try the accused, power to take into consideration the earlier proceedings as if they were part of the record in the trial without the necessity of formal proof and does not make it necessary to hold a preliminary inquiry first and then a subsequent trial with the consequence that the personnel of the Court must remain throughout as originally constituted.³¹⁰

Charge to the Jury.—

Where in the course of the trial an accused person showed signs of insanity, the Judge instead of raising a preliminary issue as to the soundness of mind of the accused and his capacity to understand the proceedings to be tried by the Jury, first asked the Jury to observe the accused closely and to form their own opinion, and proceeded with the trial and the Jury found the accused not insane; *held*, that the procedure adopted was improper; and retrial was ordered to try the issue of insanity first.³¹¹ The Judge in commencing his charge to the Jury said :—"The accused D is charged with murder of R and on being called on to plead to the charge he has told you that he did kill R, but he has given reasons for doing so which are foolish and absurd, and which might lead to the inference that he is suffering under delusion and that he is not to be accounted responsible for his action. What you have, therefore, to try is, whether the accused, at the time he killed R, by reason of unsoundness of mind was incapable of knowing the nature of the act he committed or that he was doing what was wrong." *Held*, that the issue as to whether the accused was of unsound mind at the time of the trial, and incapable of properly making his defence was a preliminary issue to that put by the Sessions Judge and should have been first submitted to the Jury.³¹²

In a case in which the prisoner, arraigned on an indictment for felony, appeared to be deaf, dumb and also of non-sane mind, Alderson B, put three distinct issues to the Jury, directing the Jury to be sworn separately on each : 1st. whether the prisoner was mute of malice or by visitation of God ; 2nd. whether he was able to plead ; and 3rd. whether he was sane or not. And on this last issue they were directed to inquire whether the prisoner was of sufficient intellect to comprehend the course of the proceedings of the trial so as to make a proper defence, or to challenge a juror to whom he might object ; and he directed that if there was no certain mode of communicating to the prisoner the details of the evidence so that he could clearly understand them and be able properly to make his defence to the charge against him, the Jury ought to find that he was not of sane mind.³¹³

309. Jhabbu (1919) 42 A. 137 ; 21 Cr. L. J. 83 : 54 I. C. 483 ; Jagdeo (1917) 15 A. L. J. 239 : 18 Cr. L. J. 470 ; 39 I. C. 310.
310. Ghinua Uraon (1917) 1918 P. 57 (F.B.) : 19 Cr. L. J. 135 ; 43 I. C. 423.

311. Radhanath, *Sub-nom.* Bharat Patra (1926) 44 C. L. J. 285 ; 27 Cr. L. J. 896 ; A. I. R. 1927 C. 289 ; 96 I. C. 160.
312. Doorjodhun (1873) 19 W. R. 26.
313. Pritchard (1836) 7 C. & P. 303. "

In a case where testimonies differed as regards the sanity of the prisoner, some saying that they believed the prisoner was really insane, while a Doctor gave his opinion that the appearances were feigned, Williams, J., in his summing up, observed that while on the one hand it would be a serious thing to put a man on his trial when incapable of properly instructing his counsel for his defence, yet on the other hand the Jury should carefully guard against giving prisoners the opportunity, by simulating madness, to pervert the course of justice even for a single day.³¹⁴

S. 509 Cr. P. C.

The special rule for the admission of medical evidence, given in S. 509 Cr. P. C., has been enacted, because in the exigencies of service the Civil Surgeon might be transferred to a distant place or otherwise professionally engaged and it would be most inconvenient, if not impossible, for him to be present at the trial subsequently held in the Sessions Court for the purpose of giving evidence. Where, therefore, the medical evidence will be a material piece of evidence in the case, the Medical Officer should be examined at the earliest opportunity by a Magistrate in the presence of the accused. This Section does not require that to render the evidence of a medical witness admissible at the trial before the Court of Session, it should be recorded by the Magistrate who is making the inquiry into the case, but permits expressly the deposition of a medical witness taken and attested by *any* Magistrate in the presence of the accused to be given in evidence in an inquiry, trial or other proceeding.³¹⁵ The Magistrate should generally record the evidence of a Medical Officer instead of leaving it to the Court of Session to do so.³¹⁶ It is the duty of the Magistrate to fully examine the medical witness with reference to the injuries found by him at the examination of the person produced before him.³¹⁷ His deposition, thus taken and attested by the Magistrate, may be subsequently given in evidence in any inquiry or trial or other proceeding under the Code of Criminal Procedure without the necessity of calling the Medical Officer as a witness in such subsequent inquiry or trial. The presence of the accused has been made a requisite so that he may have the opportunity of testing the truth of the Medical Officer's testimony by cross-examination or otherwise. The circumstance that the evidence of the Civil Surgeon given in English was not interpreted to the accused was held to be of small importance, where it was understood by the prisoner's Counsel, and all necessary questions were put to the witness.³¹⁸ Before the deposition of a medical witness taken by a Committing Magistrate can, under S. 509, be given in evidence at the trial before the Court of Session, it must either appear from the Magistrate's record, or be proved by the evidence of witnesses, to have been taken and attested by the Magistrate in the presence of the accused. The Court is neither bound to presume under S. 80, nor ought it to presume under either S. 80 or S. 114, III (c), of

314. Davies (1863) 6 Cox. C. C. 326. See also per Wills, J in Berry (1897) L. T. 110.

315. Durga (1893) 13 A. W. N. 180.

316. Kaira District Magistrate's Letter, no 94 (1874) Rat. 81.

317. Bhag Singh (1924) 26 P. L. R. 343.

318. Bhoobun (1875) 24 W. R. 50.

the Evidence Act, that the deposition was so taken and attested.³¹⁹ The words "presence of the the accused" were not in S. 323 of the Code of 1872, but such presence was held necessary.³²⁰ Failure to append a certificate in the prescribed form has not the effect of making the evidence inadmissible, if it otherwise appears that the statement was recorded and attested by the Magistrate in the presence of the accused.³²¹

The words "or taken on commission under Chapter XL", which were not in the Code of 1882, were inserted in the Code of 1898 to allow the deposition of a medical witness taken on commission to be put in evidence, which could not have been done under the Code of 1882 as was held in 9 A. 720, 10 A. 174 and 18 C 129.

Besides the Civil Surgeon there are other Medical Officers who may be called as witnesses viz, a Commissioned Medical Officer, Native Surgeon, Assistant Surgeon, Warrant Medical Officer, Passed Hospital Assistant, Hospital Apprentice or Civil Apothecary. All these are authorised to examine bodies forwarded to them for the purpose of *post-mortem* examination under S. 174 Cr. P. C. The words "other medical witness," however, does not apply exclusively to the Medical Officer in Government service. It may include a private medical practitioner.

The only piece of medical report which may be admitted as evidence without calling the medical man is the report of the Chemical Examiner mentioned in S. 510 Cr. P. C.

Deposition and not the report of a medical man is evidence.—

The *deposition* of the Medical Officer is evidence, not his report. The substance of a report from a subordinate Medical Officer, with an expression of concurrence by the Civil Surgeon, cannot be read as evidence under this Section.³²² A letter of a Medical Officer expressing an opinion is not evidence.³²³ The only opinion of a Civil Surgeon, which can be considered in judicially dealing with the case, is an opinion expressed by him when examined as a witness under the usual tests to which witnesses are subjected.³²⁴ The report of the *post-mortem* examination written in the form usually filled up by the Civil Surgeon at the time of the said examination is not evidence and no facts could be taken from it.³²⁵ It can only be used by the witness who conducted the post-mortem inquiry as an aid to memory ; S. 509 is not intended to be applied when the medical witness is present in Court.³²⁶ Notes of autopsy or personal inspection of a body after death,³²⁷ or a death certificate³²⁸ are not

319. Kachali (1890) 18 C. 129 [approving Riding (1887) 9 A. 720 : 7 A. W. N. 228 ; Pohp Sing (1887) 10 A. 174 : 8 A. W. N. 11.

320. See *In re Jhubboo Mahton* (1882) 8 C. 739 : 12 C. L. R. 233.

321. *Nawab* (1932) 34 Cr. L. J. 443 : A. I. R. 1933 L. 131 : 142 I. C. 577 [referring to *Kachali* (1890) 18 C. 129].

322. *In re Chintamonee* (1869) 11 W. R. 2.

323. *Kaminee Dossee* (1869) 12 W. R. 25.

324. *Samiruddin* (1881) 8 C. 211 : 10 C. L. R. 11.

325. *Roghuni* (1882) 9 C. 455 : 11 C. L. R. 569 ; *Jadub Das* (1899) 27 C. 295, 303 : 4 C. W. N. 129 ; *Ram Sarup* (1901) 6 C. W. N. 98.

326. *In re Rangappa Goundan* (1935) 70 M. L. J. 447 : 37 Cr. L. J. 471 : 161 I. C. 663 [referring to *Jadub Das* (1899) 27 C. 295].

327. *Savla* (1891) Rat 549.

328. *In re Venkatroyadu* (1881) 2 Weiç 659.

evidence. The certificate of the Professor of Anatomy at the Grant Medical College as to certain bones sent to him for examination is not *per se* admissible in evidence ; it is only hearsay evidence ; the Professor must be examined as a witness.³²⁹ The certificate of a Civil Surgeon as to the noxious nature of a trade is not legal evidence.³³⁰ The medical witness must be examined directly as to the facts and cannot merely attest as correct his previous death-certificate,³³¹ or deposition in another case.³³²

The evidence of a medical man, who has seen, and has made a post-mortem examination of, the corpse touching whose death the inquiry is, is admissible, firstly to prove the nature of injuries which he observed, and, secondly, as evidence of the opinion of an expert as to the manner in which those injuries were inflicted, and as to the cause of death.³³³ Although the deponent may not be called as a witness, the Sessions Judge is not precluded in any way from calling the medical man and examining him as a witness (See Sub-s. (2) of S. 509 Cr. P. C.) and this should be done in every case in which the deposition taken by the Magistrate is essentially deficient or requires further explanation or elucidation.³³⁴ In a case of murder or manslaughter, when the medical report is inconsistent with the prosecution evidence, it is the duty of the prosecution to call the Medical Officer himself or to give other medical evidence in the hearing of the Jury. The prosecution has no right to stand merely upon the deposition given by the Medical Officer before the Committing Magistrate in its recorded form.³³⁵ In a case depending almost entirely upon medical evidence, the evidence of the Civil Surgeon should not be tendered and accepted as sufficient evidence. All the evidence before the Magistrate as to the symptoms should be re-taken and the Civil Surgeon should be examined as an expert in the case in regard to those symptoms.³³⁶

Report or Certificate of a medical man may be used only to refresh his memory, or to corroborate or contradict him.—

The Medical Officer who held the *post-mortem* examination may use the report to refresh his memory when giving evidence, but the report itself is not admissible in evidence.³³⁷ The writer of such reports or certificates may be corroborated³³⁸ or contradicted³³⁹ by them.

Value of the opinion of a medical witness, or of a Chemical Examiner.—

A Civil Surgeon gave his opinion that from the nature of the injury on the head of the deceased, he could not have uttered a word after being struck. Witnesses, however, deposed

329. Ahila Manaji (1922) 47 B. 74 : 26 Cr. L. J.

339 : A. I. R. 1923 B. 183 : 84 I. C. 643.

330. Gokal Chand (1919) 1 L. 163 : 21 Cr. L. J. 462 : 56 I. C. 446.

331. *In re Venkatroyadu* (1881) 2 Weir 659.

332. Salu (1895) Rat. 792.

333. Roghuni (1882) 9 C. 455 : 11 C. L. R. 569.

334. Roghuni (1882) 9 C. 455 : 11 C. L. R. 569.

335. Debendra (1929) 56 C. 566 : 33 C. W. N. 632 : 50 C. L. J. 1 : 30 Cr. L. J. 1031 : A. I. R. 1929 C. 244 : 119 I. C. 378.

336. Mantapampalla (1882) 2 Weir 660.

337. Roghuni (1882) 9 C. 455, 461. *See also* Jadab Das (1899) 27 C. 295, 303 ; Ram Sarup (1901) 6 C. W. N. 98 ; Bhag Singh (1924) 26 P. L. R. 343.

338. Gokal Chand (1919) 1 L. 163 : 21 Cr. L. J. 462 : 56 I. C. 446.

339. Jaduh Das (1899) 27 C 295, 303 ; Ram Sarup (1901) 6 C. W. N 98 : Gokal Chand (1919) 1 L 163, 166 : 21 Cr. L. J. 462 : 56 I. C. 446.

that the deceased spoke certain words. The Judge disbelieved these witnesses on the strength of the medical opinion : *Held*, that it is not the proper way to try a case to rely on mere theories of medical men or skilled witnesses of any sort against facts positively proved.³⁴⁰ A Judge is not entitled to discard the whole of the direct evidence of credible and unimpeached witnesses who depose that they with their own eyes saw something done, upon the strength of the opinion of a medical witness to the effect that those things could not have been done.³⁴¹ Where there was strong direct evidence as to the place of a certain murder but no blood was detected by the chemical examination of the earth and the leaves and grass taken from that place, the negative effect of the Chemical Examiner's report was held not to be sufficient to rebut the strong direct evidence as to the place of occurrence.³⁴² Where in a case under S. 325 I. P. C. the medical opinion was that the injuries of the deceased were not, in the case of a man of ordinary health, dangerous to life ; *held*, that the Judge should have specifically called the attention of the Jury to such opinion.³⁴³ The rule that the evidence of one party should not be received as evidence against another party without the latter having an opportunity of testing its truthfulness by cross-examination, applies more forcibly to a criminal case where death may be the result. No person, therefore, ought to be put in peril of capital or any punishment on a written report of a Chemical Examiner not given on oath and untested by cross-examination. To accept such a report, whatever it may contain, as proof of death by arsenic poisoning or of anything, is an impossible proposition of law.³⁴⁴

Improper admission of a medical report, Effect of—

Where there is sufficient evidence, independent of the inadmissible medical report, the fact that the Judge in his charge to the Jury has used that report as evidence and commented upon it need not affect the conviction.³⁴⁵ When a certificate or report of a Civil Surgeon is relied upon as proof of hurt or grievous hurt and there was no other evidence on the point, the conviction should be set aside.³⁴⁶ Medical evidence adduced on behalf of the prosecution before the Committing Magistrate cannot be left over to be read for the first time at the time of the Judge's summing up. All the evidence for the prosecution must be given before the accused is called on for his defence and the accused is clearly entitled to observe upon or rebut the *prima facie* evidence afforded by the evidence of the medical witness recorded by the Committing Magistrate.³⁴⁷

How to take the opinion of a medical man as an expert.—

A medical man, who has not seen the corpse, is in a position to give evidence of his opinion as an expert. The proper mode of eliciting such evidence is to put to the

340. Ahmed Ally (1869) 11 W. R. 25.

341. Wazir Ali (1889) 9 A. W. N. 74.

342. Hassenulla (1923) 28 C. W. N. 561 : 26 Cr. L. J. 5 : A. I. R. 1924 C. 625 : 83 I. C. 485.

343. Panchu (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

344. Happu (1933) 56 A. 228 : 35 Cr. L. J. 280 : A. I. R. 1933 A. 837 : 146 I. C. 1089.

345. In re Chintamonee (1859) 11 W. R. 2.

346. Kamanee Dossee (1869) 12 W. R. 25.

347. Criminal Letter No. 960, dated 21st August 1867 : 8 W. R. Cr. Lett. 19.

witness hypothetically the facts which the evidence of the other witnesses attempts to prove, and to ask the witness' opinion on those facts. The questions are to be put in this way :—

“Assuming such-and-such facts to be true, what is your opinion on the matter ?”

“Assuming such-and-such an injury, an injury of such-and-such a kind, to have been inflicted, what is your opinion as to the nature of the weapon by which it was possibly or probably inflicted ?”

The facts thus hypothetically stated to the witness would, of course, be the facts which the evidence of other witnesses in the case attempted to prove, and as to which it was for the Jury to find whether they had been proved or not.³⁴⁸ No facts stated in the report of a medical man can be taken by another medical witness as the basis of his expert opinion,³⁴⁹ nor can the Court examine him on matters contained therein.³⁵⁰

S. 510 Cr. P. C.

The Section speaks of *any* Chemical Examiner or Assistant Chemical Examiner. This will include an Additional Chemical Examiner. The word '*any*' was introduced in the Code of 1882 by S. 14 of Act X of 1886 in view of the suggestion, made in the case of *Q. E. v. Autal Singh*,³⁵¹ which *held*, under the relevant Sections, that “Additional Chemical Examiner” was not included in the words “the Chemical Examiner or Assistant Chemical Examiner”.

The original report of the Chemical Examiner to Government bearing his signature, and not a copy of the report, should be put in evidence.³⁵² “Under the hand of” means, that in a case of poison, it must be signed by the officer who detected the poison, and who, from personal knowledge, can certify to the correctness of the result embodied in it.³⁵³

Before the report is admitted in evidence, the identity of the packet received by the Chemical Examiner with that taken from the prisoner must be proved by calling the packer and despatcher.³⁵⁴ The Judge should warn the Jury that before using the Chemical Examiner's Report they must be satisfied on the evidence that the substances examined were in fact what they were said to be.³⁵⁵ Where there was no evidence to connect the parcels which reached the Chemical Examiner with those which were despatched by the Assistant Surgeon, *held*, that this was not a mere technical defect and therefore the report of the Chemical Examiner as to the contents of the parcels

348. Roghuni (1882) 9 C. 455 : 11 C. L. R. 569.

349. Roghuni (1882) 9 C. 465, 461 : 11 C. L. R. 569.

350. Jadub Das (1899) 27 C. 295, 303.

351. (1884) 10 C. 1026.

352. Biswambhar (1871) 6 B. L. R. App. 122.

353. In re Venkataswami (1886) 2 Weir 661.

354. Autal (1884) 10 C. 1026; In re Chukkapalli (1910) 11 Cr. L. J. 222 : 6 I. C. 51.

355. Ofel Molla (1913) 18 C. W. N. 180 : 15 Cr. L. J. 147 : 22 I. C. 723.

could not be taken into consideration; *held* further, that as the parcels did not reach the Chemical Examiner, who lived only 5 miles off, until 3 days after the despatch and the delay was not explained, it was an important omission.³⁵⁶ A report which does not give sufficient information about the quantity of poison found, is unsatisfactory, without the examination of the medical man who examined the corpse or of the Chemical Examiner.³⁵⁷ Whenever a Magistrate or a Court of Session finds that the report is inadequate, they should not admit it in evidence unless the officer concerned submits a full and satisfactory report or has been examined in support of it. However, if a Sessions Judge or Magistrate admits a report which is meagre and unsatisfactory, it is not possible for the Chief Court or High Court to reject it as inadmissible.³⁵⁸ But where it was not objected to by the accused or his Counsel, nor did they make any request for the examination of the Chemical Examiner, the report must be taken to be admitted.³⁵⁹ The provision of S. 510 is of an exceptional nature. It is, however, deliberately enacted, and the Courts are bound to give effect to it. It can hardly be open to the Courts to render the enactment nugatory by refusing to attach any weight to the report of the Chemical Examiner unless he is examined. It is always open to the Court to call the Chemical Examiner, when this course is deemed necessary in the interests of justice. He does not, as a rule, give any opinion as to the cause of death, but merely reports the result of the chemical examination of the substance sent to him. It is for the Court to determine the cause of death from the report, the post mortem examination report and the other evidence in the case.³⁶⁰

An appellate Court cannot peruse the Chemical Examiner's report unless it passed a formal order admitting it as additional evidence and complied with the provisions of S. 428 of the Code.³⁶¹

When a report is received from the Chemical Examiner containing a quantitative analysis, it should be shown to the Medical Officer who conducted the *post-mortem* examination so that he may be in a position to state before the Committing Magistrate what are the medico-legal inferences to be drawn from the report.³⁶²

As to the value of a Chemical Examiner's Report, see Notes under heading "*Value of the opinion of a Medical witness and of Chemical Examiner*", *ante*.

356. Muhammad Din (1925) 26 Cr. L. J. 1420 : A. I. R. 1926 L. 79 : 89 I. C. 844.

357. Ahirannessa (1923) 27 C. W. N. 1xiii.

358. Musst. Gaya Kunwar (1933) 11 O. W. N. 312 : 35 Cr. L. J. 750 : A. I. R. 1934 O. 62 : 148 I. C. 600.

359. Bachcha (1934) 57 A 256 : 36 Cr. L. J. 362 : A. I. R. 1934 A. 873 : 153 I. C. 472.

360. Aishan Bibi (1933) 15 L. 310 : 36 Cr. L. J. 14 : A. I. R. 1934 L. 150 : 152 I. C. 206.

361. Wali Muhammad (1923) 21 A. L. J. 869 : 26 Cr. L. J. 200 : A. I. R. 1924 A. 193 : 83 I. C. 904.

362. Happu (1933) 56 A. 228 : 35 Cr. L. J. 280 : A. I. R. 1933 A. 837 : 146 I. C. 1089.

CHAPTER III.

Of Evidence.

S. 6, Evidence Act.

Res gestae.—

The statement of a person, not examined as a witness, alleging abduction by the accused year before, is not part of the *res gestae*, within S. 6 of the Evidence Act, of the subsequent abduction for which they were on trial, and was therefore not admissible in evidence. Where such a statement was admitted in evidence, which gave a direct denial to the main defence of the appellants, which was to the effect that the girl was made over by the said person to one of the appellants and had been married to him : *Held*, that the reception of this evidence seriously prejudiced the accused and is a good ground for setting aside the conviction.¹

The prisoners were charged with abetment of dacoity. Evidence was given that the names of the prisoners were called out by the lathials who attacked the house. The Judge told the Jury : "If the Jury believe that this cry was raised, although the mention of the names of the prisoners by the lathials cannot be taken as direct evidence against them, it is clear that the mention of their names by parties who are known to be their servants may be taken as a corroboration of the other circumstantial evidence which has been adduced against the said prisoners." *Held*, that, it being admitted that the prisoners were not present at the time of the dacoity, it must first be proved that the dacoits were set in motion by the prisoners, and the offence was the probable result of the abetment or a part of the conspiracy, before the cries of the dacoits can be made corroborative evidence against the prisoners, and consequently the Judge has misdirected the Jury ; and further, that the Judge was wrong in telling the Jury that the cries were uttered by persons known to be the servants of the prisoners, whereas he ought to have told them that unless the evidence established the fact that the prisoners did abet the offence and the dacoits were the hired servants of the prisoners (the prisoners were acquitted of the charge of hiring the lathials), the cries of the mob ought not to be received as evidence as forming part of the *res gestae* and showing the character of the principal act.² The prisoners, who were alleged to have abducted a woman at night, produced a witness who gave evidence that he had seen certain other women of the abducted woman's house-hold search for something at dusk the same evening, the suggestion being that the woman was actually missing in the evening and could not have been abducted at night, but the women themselves were not examined : *Held*, that the evidence was not admissible under Ss. 6, 8 or 9 of the Evidence Act.³

1. Khijiruddin (1925) 53 C. 372, 384, 385 : 42 C. L. J. 504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.

2. Nawab Jan (1867) 8 W. R. 19, 24.

3. Fazaruddin (1925) 42 C. L. J. 111 : 26 Cr. L. J. 1553 : A. I. R. 1926 C. 105 : 90 I. C. 433.

The Judge misdirects a Jury if he tells them that the statement of the approver witness to the effect that the prisoner B exclaimed at or about the time of the commission of the offence that C (another prisoner charged with instigating the offence) had urged him to commit such and such an offence, is evidence against C.⁴

What is the first reasonable opportunity after the commission of a sexual offence for the prosecutrix to make a complaint (so as to make the evidence of the person to whom the complaint is made admissible) must depend on the circumstances of each case; an early complaint is not excluded because there has been a previous complaint.⁵

S. 8, Evidence Act.

Motive.—

The prisoner was charged under S. 471 I. P. C., for dishonestly using a forged document. The forgery consisted in the alteration of some dates. The facts showed that there could apparently be no motive for altering those dates. Under the circumstances, the Judge ought to have directed the attention of the Jury to the above apparent want of motive, and have left it to them to decide whether a fraudulent or dishonest intention could be fairly inferred or presumed; but instead of doing so he directed them to consider whether the prisoner was interested in making the alterations, and, if so, to infer a dishonest motive. The charge was, therefore, defective and materially prejudiced the prisoner, and a new trial should be ordered.⁶ Where the Judge in his charge to the Jury suggested speculative motives for a crime of so serious a nature as dacoity with murder: *Held*, that it was a serious misdirection, as a native Jury are too apt to adopt any suggestion, however speculative, as to motives for any given crime.⁷ Where the eye-witnesses are discredited, no stolen property was found and there was no credible motive for the crime, the Judge should direct the Jury to be extremely cautious in convicting of dacoity.⁸ Where, however, any statement requires corroboration in material particulars, evidence of motive by itself is not sufficient for such purpose; because motive is not a material particular, for it is not the duty of the prosecution to prove any motive and it is impossible in most cases to assign motives to the conduct of other persons.⁹ However strong and convincing the evidence of an adequate motive may be, that evidence is not so important as the direct or circumstantial evidence of the commission of the crime with which an accused person may be charged.¹⁰ Absence of motive is, of course, not sufficient to establish innocence, but it is important and should be placed before the Jury.¹¹ In a case of libel the appellant complained that the Judge had not mentioned the absence of motive. The Court of

4. Jaffir Ali (1873) 19 W. R. 57, 64.

5. Lee (1912) 7 Cr. A. R. 31.

6. Jaha Bux (1867) 8 W. R. 81.

7. Nawab Jan (1867) 8 W. R. 19, 24. *See also* Dattu (1838) Rat. 426.

8. Kallappa (1895) Rat. 806, 807.

9. Tufani Sheikh (1911) 15 C. L. J. 323 : 13 Cr. L. J. 283 : 141 C. 667.

10. Vaithinatha Pillai (1913) 40 I. A. 193 : 17 C. W. N. 1110 (P.C.) : 18 C. L. J. 365 : 36 M. 501 : 15 Bom. L. R. 910 : 11 A. L. J. 881 : 14 Cr. L. J. 577 : 21 I. C. 369.

11. In the matter of Chinibash (1878) 1 C. L. R. 436.

Criminal Appeal observed : "In many cases is this a matter of importance, but in this * * not * * of any." * *¹² In a case in which the prisoner had been convicted of culpable homicide not amounting to murder the Sessions Judge had told the Jury that "the mere want or failure of proved ill-will at once disposed of the higher charge of murder." Seton-Karr, J. said :—"I do not understand why the Sessions Judge told the Jury that the mere want or failure of proved ill-will at once disposed of the higher charge of murder * * Granting that no motive was proved, the murder was deliberately perpetrated. The Sessions Judge should have told the Jury that if they believed the evidence of the main witnesses, they should not hesitate to convict the prisoners of culpable homicide amounting to murder, for I do not see any circumstance to take it out of that category. I should be sorry to say that in every case where a fellow creature is barbarously and coolly put to death murder can not be sustained, unless a motive or previous ill-will was proved."¹³

It is the practice of the Courts first of all to lay before the Jury the direct evidence against the prisoners, and then to tell them that in determining the value of that evidence they should consider the evidence of the motive which is attributed as the cause of the offence. Where, therefore, the Judge, before laying the evidence before the Jury in detail, asks the Jury to consider whether, having regard to the previous relations between the deceased and the prisoner arising out of previous litigation, the accused were not likely to have committed the offence charged : *Held*, that it was misdirection which seriously prejudiced the prisoner under trial.¹⁴

Conduct.—

Where the Judge in his summing up commented upon the fact that one of the prisoners was absent from home on the night of the dacoity, and that he has adduced no evidence to contradict this or to show that he was innocently engaged ; it was held that this was an observation which should not have been made, and cannot but have seriously prejudiced the prisoner, for his own absence from home would be no legal corroboration of the evidence of the approver ; unless there was *prima facie* sufficient legal evidence to convict him of the offence, he would not be bound to account for his movements.¹⁵ But where the prisoner absconded and remained away until he was arrested seven months after the murder and he and his witnesses gave a false account as to the time when he left his village and did not give any other, such absconding is some corroboration of the accomplice's evidence that the prisoner was a party to the murder, and is sufficient for the Court to act upon.¹⁶

Where the Judge, after pointing out to the Jury the Sub-Inspector's evidence that he found the accused and the other villagers absconding, wound up by saying,—“Under the circumstances, can the Jury doubt” etc : *Held*, that this was misdirection, in as much as it was the duty of the Judge to tell the Jury that absconding was a matter which was equally

12. Brownhill (1912) 8 Cr. A. R. 120.

13. Jaichand (1867) 7 W. R. 60.

14. Hurry Churn (1883) 10 C. 140; 147 : 13 C. L. R. 358.

15. Bepin Biswas (1884) 10 C. 970.

16. Gobardhan (1887) 9 A. 528 : 7 A. W. N. 156, per Edge, C. J. and Straight, J. ; *Contra*, Brodhurst, J.

consistent with innocence as with guilt, and that it could only be considered in connection with the rest of the evidence and it was for the Jury to attach any weight to it which the rest of the evidence enabled them to do, but that it was in itself a circumstance of no weight.¹⁷

The statement of a person, not examined at the trial, affecting the conduct of a witness, is purely hearsay, and not admissible under S. 8 of the Evidence Act. Where such a statement is admitted, and in view of the defence taken, serious prejudice to the accused is caused thereby, the verdict should be set aside.¹⁸ It is a misdirection on the part of the Judge to place the conduct of a brother of the accused as evidence against the accused, as there was nothing to show with any degree of certainty that the knowledge which influenced the brother's conduct was necessarily derived from the accused and that he did not act on his own initiative and without any suggestion from the accused.¹⁹ In a case under S. 471 and Ss. 471/109 I. P.C., where the Sessions Judge commented on the conduct of the accused's pleader in the civil suit in these words: "Then I must bring to your notice the circumstance that the accused's pleader in the civil suit adopted the extraordinary precaution of requiring his client to endorse on the document itself a statement that he and his brother tendered it for production in evidence in the suit before he, the pleader, would undertake to put it in", the High Court observed—"Whether the conduct on the part of the pleader be usual or unusual it is no evidence against the accused in this prosecution."²⁰

Evidence relating to proposals for compromise ought not, in the exercise of a proper discretion, to be allowed to go in as evidence of guilty knowledge.²¹

When the Judge put before the Jury the evidence of conduct of one of the accused, as if the Jury could, if they chose, draw an inference from it against all the accused: *Held*, that there was a misdirection.²²

Where in a case of misappropriation the complainant waited for about three years before taking any serious steps for the recovery of his money, *held*, that this conduct should have been brought prominently to the notice of the Jury.²³

S. 24, Evidence Act.

As regards the admissibility of confessions the law on the subject is contained in S. 24 of the Indian Evidence Act. This Section must be fairly construed according to its language,

17. *Asfar Sheikh* (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52 ; *Ofel Molla* (1913) 18 C. W. N. 180 : 15 Cr. L. J. 147 : 22 I. C. 723.

18. *Khijiruddin* (1925) 53 C. 372 : 42 C. L. J. 504 : 27 Cr. L. J. 266 : A. I. R. 1926 C. 139 : 92 I. C. 442.

19. *Sourendra* (1905) 10 C. W. N. 153 : 3 Cr. L. J. 144.

20. *Dhunno Kazi* (1881) 8 C. 121 : 13 C. L. R. 151.

21. *Abbas Peada* (1898) 25 C. 736 : 2 C. W. N. 484.

22. *Waman* (1903) 27 B. 626 : 5 Bom. L. R. 599.

23. *Ram Charitar* (1930) 34 C. W. N. 954 : 32 Cr. L. J. 186 : A. I. R. 1931 C. 10 : 128 I. C. 807.

and if this is done it is not possible to contend that the law in India is identical with the law in England as explained in *Queen v. Thompson* (1893) 2 Q. B. 12 : 17 Cox C. C. 641 and the cases referred to therein (In England when a doubt arises as to the admissibility of a confession the Court has to decide whether it has been proved affirmatively to be free and voluntary). The question which a Court has to decide when determining on the admissibility of a confession is whether it appears to the Court to have been induced by the means mentioned in the Section. It may be that this Section does not require positive proof within the meaning of S. 3 of the Evidence Act of improper inducement to justify the rejection of the confession. The use of the word "appears," it may be argued, indicates a lesser degree of probability than would be necessary if "proof" had been required. A Court might, perhaps, in a particular case, fairly hesitate to say that it was proved that the confession had been unlawfully obtained, and yet might be in a position to say that such appeared to it to have been the case. Still, although we think that very probably a confession may be rejected on well-grounded conjecture, there must be something before the Court on which such conjecture can rest.²⁴ The English case-law bearing on the question of admissibility of confessions was discussed in the judgment of the Privy Council in an appeal from the Supreme Court of Hongkong²⁵ and it was said : "It has been established as a positive rule of English Criminal Law that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale. The burden of proof in the matter has been decided by high authority in recent times in *Reg. v. Thompson* (1893) 2 Q. B. 12 : 17 Cox C. C. 641."

Confession—Voluntariness and truth of—Duty of the Judge.—

The Judge cannot leave it to the Jury to decide whether a confessional statement is voluntary or not. The Judge should decide the question of admissibility of the statement, on a decision come to by him that it is voluntary or not. After the Judge's decision has been given he should direct the Jury to say whether the confessional statement is true or not.²⁶ Where the Judge without stating to the Jury his decision on the question whether the accused's confession was voluntary or not, left it for their decision, and he also omitted to tell them that it was for them to determine as to its truth : *Held*, that these amounted to misdirection which vitiated the trial.²⁷ It is for the Judge to decide for himself whether *prima facie* the confession of the accused appears to him to have been induced by threat or promise and for that reason to be inadmissible. If he comes to the conclusion that it is inadmissible, he

24. *Basvanta* (1900) 25 B. 168 : 2 Bom. L. R. 761 [following *Balvant* (1874) 11 Bom. H. C. R. 137] ; *Panchkari* (1924) 52 C. 67 : 29 C. W. N. 300 : 26 Cr. L. J. 782 : A. I. R. 1925 C. 587 : 86 I. C. 414.

25. *Ibrahim* (1914) 1914 A. C. 599 : 18 C. W. N. 705 (P. C.) : 15 Cr. L. J. 326 : 23 I. C. 670, per Lord Sumner.

26. *Kashim Ali* (1934) 38 C. W. N. 586 : 36 Cr. L. J. 70 : A. I. R. 1934 C. 651 : 152 I. C. 234 ; *Nayeb Shahana* (1934) 61 C. 399 : 38 C. W. N. 659 : 35 Cr. L. J. 1479 : A. I. R. 1934 C. 636 : 152 I. C. 44.

27. *Ram Lal* (1934) 36 Cr. L. J. 135 : A. I. R. 1934 C. 717 : 152 I. C. 681,

must exclude it from the consideration of the Jury. It is not the province of the Jury to decide the question of admissibility of evidence. On the other hand, if the Judge considers the confession admissible, it is his duty to point out to the Jury that the fact that he considers the evidence admissible does not necessarily mean that it is true and it is for the Jury to make up their minds whether they should accept the confession, and in doing so they should naturally be guided to a large extent by their opinion on the question whether the confession was voluntary or not.²⁸ The Judge ought not to take away entirely from the consideration of the Jury the voluntariness of the confession.²⁹ To Judge of the truth or falsity of a statement, one must endeavour to find out whether it was voluntarily made, for a free and voluntary statement is some guarantee of its truth and one test which the Jury will have to apply to appraise its value is whether it was freely and voluntarily made.³⁰

In telling the Jury that if they considered the confessions to have been voluntary, genuine and credible, they might convict the accused, there is no misdirection.³¹ The question of the admissibility of a confession is for the Judge, and that of its truth or falsity for the Jury. If a confession is voluntary but false, the Judge must admit it in evidence and put it to the Jury with proper direction as to its falsity for the purpose of appraisalment of its worth. If the confession is true but the Court doubts its voluntariness, it must be excluded from evidence.³²

As regards a confession the question may arise as to whether it is voluntary and also whether it is true. Neither is a question of law, both are questions of facts. But the point that arises is whether the confession is inadmissible in law, and in order to decide that point it is necessary to decide *prima facie* whether the confession was voluntary. In other words, to the extent of the admissibility of the confession the Judge has to decide whether the confession is voluntary. These two questions of fact, namely whether the confession is voluntary and whether it is true are, in a sense, entirely separate from each other. A confession which is voluntary is not necessarily true, and *vice versa*. But when the question arises not of admissibility but of proof, that is to say proof of the truth of the confession, it is not surprising to find, having regard to the course of human conduct that the two questions are mixed up; and the truth of the confession may to a certain extent be inferred from its voluntariness. Therefore, if the Judge has to decide the question of voluntariness in its bearing on admissibility, there is no reason why the Jury should not consider the question of voluntariness in its bearing on the truth of the confession. To ask the Jury to accept the voluntariness of a confession and then to consider its truth quite apart from the question of its voluntariness, is to ask them to attain a mental detachment which is unpractical and perhaps impossible and amounts to a misdirection.³³

28. Kesari Dayal (1909) 11 Bom. L. R. 332 : 10 Cr. L. J. 65 : 2 I. C. 517 ; Baldeo (1932) 34 Cr. L. J. 369 : A. I. R. 1933 C. 187 : 142 I. C. 639 ; Badam Ali (1935) 40 C. W. N. 794. [citing *Burton v. State* 107 Ala. 108]; Bhakta Bhusan (1936) 40 C. W. N. 668.
29. Shiekh Abdul (1924) 26 Cr. L. J. 606 : A. I. R. 1925 C. 887 : 85 I. C. 830.

30. Kabili Katoni (1918) 22 C. W. N. 809 : 19 Cr. L. J. 959 : 47 I. C. 811.
31. Munshi Sheikh (1882) 8 C. 616.
32. Panchkari (1924) 52 C. 67 : 29 C. W. N. 300 : 26 Cr. L. J. 782 : A. I. R. 1925 C. 587 : 86 I. C. 414.
33. Kasimuddin (1934) 62 C. 312 : 39 C. W. N. 27 : 36 Cr. L. J. 485 : A. I. R. 1934 C. 853 :

Jardine, J. in *Q. E. v. Dada Ana*³⁴ observed: "Although it was the duty of the Judge to point out, and of the Jury to weigh, the fact that the confessions had not been invalidated, and there was no proof of ill-treatment, I am of the opinion of *Nanabhai, J.* in *Q. E. v. Mania*³⁵ that it was for the Jury to determine what weight to attach to those confessions as well as to any other portion of the evidence in the case. I think the Jury were competent, if not bound, to look at the probabilities, and apply to the case their general experience of men and affairs (Taylor on Evidence, P. 1244). The reports show that many confessions are induced by improper means, and that innocent people often accuse themselves falsely is known to the reader of any book on Evidence. Conspiracies to ruin people by false charges are not uncommon. I think, it is the duty of the Judge to lay the confessions properly before the Jury, pointing out the circumstances bearing for and against their value but it is for the Jury to form an opinion as to their weight. The retraction of confession is, as Mr. Justice Straight said in *Q. E. v. Babu Lal*,³⁶ an endless source of anxiety and difficulty to those who have to see that justice is properly administered. The Jury have to bear their share of the burden, and to be extremely cautious, being bound to see if any reasonable doubt remains." The Judge should point out to the Jury any invalidating or detracting facts, such as interval after arrest, entire absence of criminating evidence,³⁷ to clear up any reasonable doubts, based on their general experience, though not shared by the Judge.³⁸ A Judge is hardly justified in treating a confession made by a prisoner before a Magistrate as a mere piece of evidence which the Jury may deal with in the same way as they would with the evidence of a witness of doubtful veracity. In asking the Jury whether they believe the confession of the prisoners, the Judge should have shown that, if there had been any doubt as to the reality or genuineness of those confessions, if there had been any suggestion that they had been induced to confess the commission of a crime, of which they were not guilty, by torture or the influence of fear or hope or reward, that such suspicion would have been removed by the fact that, on the persons so confessing, stolen property had been found, the possession of which was accounted for by such confession, and which was accounted for in no other way.³⁹

It is the duty of the Judge, not of the Jury, to decide the point whether an accused person, while making a confession, was or was not in the custody of the police, as it is a matter of fact which is necessary to be proved in order to enable the confession to be admitted in evidence. (See. S. 298 (1) (c) Cr. P. C.)⁴⁰ When a confession made before a Panchayet was placed before the Jury, the Judge stating that the members of the Panchayet were not persons in authority and the accused was not then charged with an offence: *Held*, that the Sessions Judge misdirected the Jury in the matter of the confession, the President of the Panchayet may be a person in authority within the meaning of S. 24 of the Evidence Act

154 I. C. 273. See also *Kishori* (1935) 39 C. W. N. 986; 36 Cr. L. J. 921; A. I. R. 1935 C. 308; 156 I. C. 396; *Badan Ali* (1935) 40 C. W. N. 794.

34. (1890) 15 B. 452, 461.

35. (1886) 10 B. 497, 522.

36. (1884) 6A. 509, 543 (F. B.); 4 A. W. N. 229.

37. *Fakira* (1915) 40 B. 220, 233; 17 Bom. L. R. 1059; 17 Cr. L. J. 133; 33 I. C. 309.

38. *Rupya* (1886) Rat. 245, 249.

39. *Shahabut Sheikh* (1870) 13 W. R. 42, 43.

40. *In re Sankappa* (1908) 31 M. 127, 129; 18 M. L. J. 66; 7 Cr. L. J. 325.

and to tell the Jury that he was not was clearly erroneous, the matter depending on a question of fact, viz, whether the confession was caused by any inducement, threat or promise, having reference to the charge against the accused ; that having regard to the inducement offered by the President and members of the Panchayet to the accused it is extremely doubtful whether the confession should have been allowed to be placed before the Jury at all ; it certainly ought not to have been placed before them without an explanation as to how they should value it, having regard to the circumstances in which it was made.⁴¹ The Village Magistrate said that if the accused spoke the truth he would consult the Head Constable and arrange that the accused should be taken as a witness. He recorded the confession. The Judge in his charge made no reference to S. 24 Evidence Act, and he only said that if the confession was true it was enough to warrant the conviction : *Held*, that the Village Magistrate was a person in authority within the meaning of S. 24, and as the arrangement promised by him before the confession was made was obviously intended to be one that would save the accused from prosecution if he would confess, the confession was not admissible.⁴²

Where the prisoner retracted his statement when read over to him by the Magistrate who recorded it and said that he was compelled to make it, and the Judge, without making any inquiry or taking any evidence on the point, submitted the prisoner's statement to the Jury as a confession : *Held*, that the Judge was wrong in so doing, and that he should rather have charged the Jury not to accept the prisoner's statement as a confession.⁴³ As soon as an accused person, whose confession is being recorded, informs the Magistrate that he is making a confession under inducement it becomes useless to record the confession, and such a confession, if recorded, becomes inadmissible and it makes no difference whether there was any inducement actually offered or not ; such a confession ought not to be allowed to go to the Jury.⁴⁴ A statement in writing by the accused, which contains an allegation from which it is to be inferred that the statement of which it forms a part was not made voluntarily, is inadmissible.⁴⁵

Where the Judge tells the Jury that the confession of the prisoner need not be taken into account at all, and no reason is given for this extraordinary statement, it is a misdirection.⁴⁶ The silence of a Judge in his charge to the Jury as to whether the confession is true or not or that it was for them to determine whether the confession was true or not, is a serious misdirection calculated to mislead the Jury.⁴⁷

A voluntary and genuine confession is legal and sufficient proof of guilt ; and the Judge was wrong in telling the Jury that the confession was evidence, but was not absolutely

41. Aushi Bibi (1916) 20 C. W. N. 512 : 23 C. L. J. 477 : 17 Cr. L. J. 188 : 33 I. C. 828.

42. Thandraya (1902) 26 M. 38, 40 : 2 Weir 733.

43. Gunesh (1865) 4 W. R. 1. See Garbad (1872) 9 Bom. H. C. R. 344.

44. Dinanath (1920) 45 B. 1086 : 23 Bom. L. R. 338 : 22 Cr. L. J. 318 : 60 I. C. 1006.

45. Tara Nath (1910) 37 C. 735 : 11 Cr. L. J. 694 : 8 I. C. 653.

46. Laxumana (1898) 2 Weir 385.

47. Ram Lal (1934) 36 Cr. L. J. 135 : A. I. R. 1934 C. 717 : 152 I. C. 681.

conclusive.⁴⁸ But it is a material misdirection to say that if a confession irrelevant under S. 24 of the Evidence Act is true, it is sufficient for conviction.⁴⁹

Where a confession of an accused is placed before the Jury and was subsequently found not to have been properly recorded and so was ruled out as inadmissible, *held*, that it might reasonably be regarded as having affected in some measure the minds of the jurymen, however the Judge might have endeavoured to remove that impression from their minds ; and under the circumstances, the accused was entitled to a new trial.⁵⁰ If a confession is admitted and from subsequent evidence it transpires that the confession is defective according to law and so inadmissible, it is open to the Judge to withdraw it from the Jury.⁵¹

It is a misdirection to treat as an admission a statement of the accused which is consistent with his innocence.⁵² Whether the statement of an accused amounts to a confession or not is a matter for the Judge : Where a statement of an accused amounted to no more than that he had witnessed the perpetration of a crime but he denied having participated in it and alleged that he protested against it, it is admissible.⁵³ Where the statements which the accused made when charged with the offence on the night of occurrence were referred to in the Judge's summing up as confessions and it was not clear whether he intended that the Jury should treat them as such, *held* that it was a misdirection ; also, where the Judge omitted to advise the Jury as to the attitude to be taken towards the retracted confession of a co-accused, *held* that it was a misdirection.⁵⁴

Retracted confession—Duty of the Judge.—

In a trial by Jury, it is the duty of the Sessions Judge to determine whether confessions retracted at the trial are admissible. If he finds them irrelevant under S. 24 of the Evidence Act, he should so direct the Jury. If there is no evidence on the record showing that they are invalid by reason of any improper inducement or threat, they should go to the Jury with a direction that in the absence of evidence it is not to be presumed that they are inadmissible. Where the Judge observed : "The mere fact of the withdrawal suggests that it (the confession) was obtained in an improper manner ;" the High Court observed : "We do not think this remark was made as a direction of law, as it is contrary to the above ruling (referring to *Reg. v. Balvant*, 11 Bom. H. C. R. 137, and *Q. E. v. Gharya*, 19B. 728). We take it to be the expression of the learned Judge's opinion on the value of a retracted confession as a matter of prudence ; and although we do not concur in so broad a statement about a retracted confession and will lay down no binding rule, we cannot say that a Judge has not a right to

48. *Jhurree* (1867) 7 W. R. 41 ; *Wazir Mundul* (1876) 25 W. R. 25 ; *Bhagi* (1906) 8 Bom. L. R. 697, 699 ; 4 Cr. L. J. 332 ; *Sangappa* (1889) Rat. 463.

49. *Thandraya* (1902) 26 M. 38, 40 ; 2 Weir 733.

50. *Madodar Ram* (1921) 3 P. L. T. 52 ; 23 Cr. L. J. 141 ; A. I. R. 1923 P. 142 ; 65 I. C. 574.

51. *Kasimuddin* (1934) 62 C. 312 ; 39 C. W. N. 27 ; 36 Cr. L. J. 485 ; A. I. R. 1934 C. 853 ; 154 I. C. 273.

52. *Schoffield* (1917) 18 Cr. A. R. 191.

53. *Jagrup* (1885) 7 A. C. 46.

54. *Hemanta Kumar* (1919) 47 C. 46 ; 30 C. L. J. 29 ; 21 Cr. L. J. 775 ; 58 I. C. 455.

state to the Jury his views on such a matter, provided he states them as such matters of fact and not as directions of law. The Judge went on to leave the confession to the Jury to be treated from the point of view of prudence by them under the light of their own experience as judges of the facts. On examining the whole charge we cannot hold that there was misdirection".⁵⁵ It is the duty of the Judge to determine the question of admissibility of a retracted confession under S. 298, Cr. P. C., and S. 24, Evidence Act. Where a confession is retracted by the accused on the ground that it was induced by torture, and especially when the confession is to be taken into consideration against his co-accused under S. 30 of the Evidence Act, and the accused has marks of violence on his body, it may be the proper course for the Judge to take evidence about the circumstances before admitting the confession in evidence. In the case of a retracted confession, if the Committing Magistrate finds marks of violence on the body of the accused, he should ascertain from the Medical Officer in charge of the Jail whether on arrival of the accused there the marks of violence on the body of the accused were visible.⁵⁶ Where the Judge told the Jury that, "as regards retracted confessions, the law is that you can look for corroboration in independent evidence. If that supplies such corroboration then you can confidently say that the confessions must be absolutely true and you can act upon them, otherwise not": *Held*, that the Judge has misdirected the Jury, as there is no absolute rule of law that a retracted confession cannot be treated as evidence unless it is corroborated in material particulars by independent reliable evidence.⁵⁷ Where a Sessions Judge made the following observations with regard to certain retracted confessions:—"They have been retracted and I advise you to pay no attention to them unless you think that they are corroborated by independent evidence. If you find that it has been satisfactorily proved that the first and second accused had in their possession property which was stolen on that night, that no doubt would be a corroboration, and you may rely upon the confessions, although they have been retracted". It was observed by the High Court:—"We are aware that language of this sort is frequently used by Judges with reference to confessional statements which have been retracted, and there are, no doubt, cases in which the proposition involved has been pronounced to be a correct one. But we are of opinion that it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence. The weight to be given to such a confession, it is clear, depends upon the circumstances under which the confession was originally given, and the circumstances under which it was retracted, including the reasons given by the prisoner for his retraction. It is obvious that a confession, if itself reasonable and probable, must, if repeated more than once and retracted only at a late stage in the proceedings, have greater weight attached to it than a confession made once only and retracted after a short interval. There are other circumstances which may go to diminish or to increase the weight that should be attached to a confession. In the present case, certainly the circumstances

55. Ganu (1896) Rat. 842.

56. Balappa (1894) Rat. 730.

57. Gangia (1898) 23 B. 316 [referring to Gharya (1894) 19 B. 728; Raman (1897) 21 M. 83 :

2 Weir 503; Maiku (1897) 20 A. 133: 17 A. W. N. 224]. See also Housabai (1932) 56 B. 542: 34 Cr. L. J. 73: A. I. R. 1932 B. 553: 140 I. C. 740.

under which the confessions were originally made and the fact of their repetition a few days later, are circumstances which ought to be brought to the attention of the Jury. The question which should be put to the Jury is not whether they are corroborated by independent evidence but whether, having regard to the circumstances under which they were made and the circumstances under which they are retracted, having regard to all the circumstances connected with the confessions, whether it is more probable that the original confession or the statements made before the Committing Magistrate are true.⁵⁸ The Court will have to consider all the circumstances of the case as part of its duty under S. 298 Cr. P. C., to prevent the production of inadmissible evidence, though no doubt it has to examine primarily the invalidating grounds mentioned in the prisoner's retraction.⁵⁹ The retraction of a confession is a circumstance of very varying importance. Its significance depends on the nature of the confession, the circumstances in which it was made, the circumstances in which the retraction was made, and the nature of the retraction. If a full and detailed confession is made in circumstances which make it unlikely that it was the result of coercion or inducement, the fact that it is subsequently retracted may mean little or nothing: for the making of the confession can hardly be explained except on the hypothesis that it is true, whereas the retraction may fairly be explained as an act of policy, the result of legal advice, or the pressure of friends, or the suggestion of more sophisticated associates in the lock-up. If a confession is retracted at the earliest opportunity, more weight may fairly be attached to it than if the accused waits until the Sessions trial; and a retraction which takes the form of a mere denial of the fact of making the confession can hardly ever be given the same importance as one which admits the making of the confession but explains it as due to coercion or illegal inducement. If there is anything in the evidence which lends support to a suggestion of the latter kind, the confession must always be most carefully scrutinized and the Court should be cautious about relying upon it. That is the real effect of the retraction of a confession. It does not cancel out the confession, but it puts the Court on inquiry as to its value, its voluntary character and the probability of its being true. And that is why it has been laid down frequently by the Court that as a general rule a retracted confession requires corroboration of some kind, although, as a matter of law, corroboration is not necessary at all, as pointed out in *Rama Kariyappa*.⁶⁰ But the amount of corroboration which the Court will look for depends on the circumstances of the particular case, and sometime very slight corroboration will suffice.⁶¹ In some earlier cases the Madras High Court held that the failure on the part of a Judge to tell a Jury that a retracted confession must be supported by independent and reliable evidence corroborating them in material particulars amounts to misdirection.⁶²

58. Raman (1897) 21 M. 83 : 2 Weir 503 ;
Chinna (1893) 2 Weir 510 [commenting on the judgment of Kernan, J. in Rangi (1886) 10 M. 295 : 2 Weir 361] ;
Papakka (1910) 11 Cr. L.J. 683 : 8 I. C. 573.
59. Panchkari (1924) 52 C. 67 : 29 C. W. N. 300 : 26 Cr. L. J. 782 : A. I. R. 1925 C. 587 ; 86 L.C. 414.

60. (1929) 31 Bom. L. R. 565 : 31 Cr. L. J. 97 : A. I. R. 1929 B. 327 : 120 I. C. 350.
61. Krishna Babaji (1933) 35 Bom. L. R. 371 : 34 Cr. L. J. 896 : A. I. R. 1933 B. 230 : 145 I. C. 133.
62. Rangi (1886) 10 M. 295 : 2 Weir 361 ; Cholakel (1886) 2 Weir 507 ; Karreti (1891) 2 Weir 509 ; Sokkan (1892) 2 Weir 509.

The Calcutta High Court has, however, held in a recent case that a charge to the Jury that the accused might be convicted on his own statements, which had subsequently been retracted, without further corroboration, is not in accordance with law and amounts to a misdirection.⁶³ Where the retracted confession of the co-accused is sought to be corroborated by the tainted evidence of another accomplice, it is not sufficient for the Judge to call the attention of the Jury to the necessity of corroboration in material particulars; he must emphasize in his charge on the necessity for untainted and independent corroboration.⁶⁴ It is not safe to convict an accused person on his retracted confession standing by itself uncorroborated, or on the statements of witnesses brought in under S. 288 of the Criminal Procedure Code without independent corroborating testimony; nor can these be joined together and held as mutually corroborating each other so as to justify a conviction based on them.⁶⁵ The evidence of motive can never by itself be sufficient corroboration.⁶⁶

It is a serious misdirection to ask the Jury to take into consideration a retracted confession in considering the case of the other accused.⁶⁷ Retracted confession, whether voluntarily made or not, is to be determined by the Judge and not to be left to the Jury. Direction that accused retracting his confession must prove that it was not voluntarily made and that it is never possible to do this, is a serious misdirection.⁶⁸ Where the Judge, in the case of a retracted confession, without making any inquiry or taking any evidence, submitted the statement of the prisoner to the Jury as a confession and further told them that they may fairly infer from the prisoner's intentions that his confession was a true one: *Held*, that there was a misdirection.⁶⁹

A Judge is unnecessarily favourable to the accused if he tells the Jury that the value of his retracted confession is almost nil even as against him.⁷⁰

The Patna High Court has also held that a conviction cannot be based on a retracted confession unless it is corroborated. It is the universal practice of the Courts not to rely or act on a confession which has been retracted, unless after consideration of the whole evidence in the case the Court is in a position to come to the unhesitating conclusion that the confession is true.⁷¹

63. Kashim Ali (1934) 38 C. W. N. 586 : 36 Cr. L.J. 70 : A.I.R. 1934 C. 651 : 152 I.C. 234.

64. Kashim Ali (1934) 38 C. W. N. 586 : 36 Cr. L. J. 70 : A.I.R. 1934 C. 651 : 152 I. C. 234 ; Ramani (1932) 34 C. L. J. 638 : A. I. R. 1933 C. 146 : 143 I. C. 797.

65. Jadub Das (1899) 27 C. 295 : 4 C.W.N. 129.

66. Tufani Sheikh (1911) 15 C. L. J. 323 : 13 Cr. L. J. 283 : 14 I. C. 657.

67. *In re Ibrahim* (1925) 42 C. L. J. 496 : 26 Cr. L. J. 1146 : A. I. R. 1926 C. 374 : 88 I. C. 458. See Hemanta (1919) 47 C. 46 : 30 C. L. J. 29 : 21 Cr. L. J. 775 : 58 I. C. 455.

68. Khiro Mandal (1929) 57 C. 649 : 33 C. W. N. 1112 : 31 Cr. L. J. 909 : A. I. R. 1929 C. 726 : 125 I. C. 730.

69. Gunesh (1865) 4 W. R. 1.

70. Abdul Salim (1921) 49 C. 573 : 26 C. W. N. 680 : 35 C. L. J. 279 : 23 Cr. L. J. 657 : A. I. R. 1923 C. 107 : 69 I. C. 145.

71. Dewan Kahar (1922) 4 P. L. T. 186 : 24 Cr. L. J. 497 : A. I. R. 1923 P. 13 : 72 I. C. 961. See also Biseswar (1922) 26 C. W. N. 1010 : 24 Cr. L. J. 145 : A. I. R. 1923 C. 217 : 71 I. C. 497.

S. 25, Evidence Act.

S. 25 of the Evidence Act says that no confession made to a Police-officer shall be proved as against a person accused of any offence. Questions sometimes arise as to how far confessional statements contained in a First Information given by an accused himself are admissible. These statements may contain, besides incriminating statements, statements as to the motive for the offence and the opportunity for the commission of the offence. The Calcutta High Court ⁷² has held in a case where a first information of murder was lodged at the Police Station by the accused himself on the morning following the murder and in the narrative of events prior to the night of the occurrence he confessed that he had committed the offence, that although by reason of the provision of S. 25 of the Evidence Act the First Information was not admissible in its entirety, yet in so far as it spoke of events prior to the night of the occurrence it was admissible in evidence if and when proved. That case has been distinguished and also doubted in a Bombay case, ⁷³ where it has been held that if the true underlying principle of S. 25 be founded on the view of the Legislature that confessions made to a Police-officer are suspect it would be very difficult to see how any part of a confessional statement can be admitted in evidence and it would seem impossible that a portion of it which deals with the opportunity or the portion of it which deals with the motive could be treated as no part of the confession.

S. 27, Evidence Act.

In laying down the law on the subject of the admissibility of the information leading to the discovery of any fact, which information was received from a person accused of any offence, in the custody of a Police Officer, the Judge has to bear in mind not only the limitations imposed by S. 27 itself, but also the general provisions of Ss. 24-26 of the Evidence Act. It is necessary, therefore, to notice some of the important judicial decisions bearing on S. 27.

Provided that.—These words suggest that S. 27 is a proviso to something enacted in the previous Section or Sections. The previous Sections dealing with confession are Ss. 24, 25 and 26. Generally, confession is a species of admissions by a person charged with an offence, stating or suggesting the inference that he committed it; and under S. 21 of the Evidence Act, it may be proved against him. But the admissibility of such a confession in evidence is restricted by the provisions contained in Ss. 24-26.

S. 24 says that a confession caused by inducement, threat or promise, proceeding from a person in authority, is irrelevant, that is to say, is not admissible in evidence.

S. 25 says that a confession to a Police-officer cannot be proved against the accused.

S. 26 says that a confession made to any person whatsoever, by a person whilst in the

72. Lalit Mohan (1921) 49 C. 167 : 25 C. W. N. 788; 22 Cr. L. J. 562 : 62 I. C. 578.

73. Harnam (1934) 59 B. 120 : 36 Cr. L. J. 539 : A. I. R. 1935 B. 26 : 154 I. C. 621.

custody of a Police-officer, unless it be made in the immediate presence of a Magistrate, cannot be proved against such person.

It is not necessary to deal here with the confession made in the immediate presence of a Magistrate, as that is governed by the provisions of S. 164 of the Code of Criminal Procedure.

From the above three Sections, it may be laid down broadly that : (1) Involuntary confession, i. e., confession induced by threat or promise, is inadmissible ; (2) confession, voluntary or involuntary, made by a person to a Police-officer, whether he was at that time in the custody of the Police or not, is inadmissible ; (3) confession, voluntary or involuntary, to whom-so-ever made, made by a person whilst he is in the custody of a Police-officer, is inadmissible. The 1st lays stress to the involuntariness of the confession, the 2nd lays stress on the person to whom the confession is made, and the 3rd lays stress on the fact that the person making the confession is in Police custody.

Then comes S. 27 and it says as follows :—

“Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.”

The first question, that naturally arises, is whether the Section is a proviso to all the three Sections 24, 25 and 26 or whether it is a proviso to S. 26 only or to Ss. 25 and 26 only ?

There is no dispute that S. 27 is a proviso to S. 26.⁷⁴

That it is a proviso also to S. 25 has been held in several cases.⁷⁵

Whether it is also a proviso to S. 24, has been discussed in some cases, and there is a conflict of decision on the point. The applicability of S. 24 comes in in this way. Suppose it is proved that an accused person, while in custody, made a confession under the influence of a threat or promise of pardon proceeding from a Police-officer, who must be taken to be a person in authority within the meaning of S. 24. Suppose that the confession contains information which leads to the discovery of some fact. The confession is inadmissible under S. 25, because it was made to a Police-officer. The confession is also inadmissible under S. 24, because it was made under compulsion or inducement. If S. 25 alone applied, S. 27 would

74. Babu Lal (1884) 6 A. 509 (F. B.) : 4 A. W. N. 229 ; Bhaju (1929) 57 C. 1062 : 34 C. W. N. 106 ; A. I. R. 1930 C. 291 : 125 I. C. 733 ; Commier Sahib (1888) 12 M. 153 : 2 Weir 738.

75. Babu Lal (1884) 6 A. 509 (F. B.) : 4 A. W. N. 229, by the majority ; Misri (1909) 31 A. 592

(F.B.) : 10 Cr. L.J. 212 : 3 I.C. 26 ; Contra by Mahmood, J. in Babu Lal (1884) 6 A. 509 (F. B.) : 4 A.W.N. 229 and by Lord-Williams, J. in Bhaju (1929) 57 C. 1062 : 34 C. W. N. 106 : A. I. R. 1930 C. 291 : 125 I. C. 733, both of whom held that S. 27 is a proviso to S. 26 and not to Ss. 24 and 25.

let in the information. But as S. 24 also applied to the case, the information is barred unless S. 27 is taken as a proviso to S. 24 also.⁷⁶

In the case of *R. v. Ram Dayal*,⁷⁷ Plowden, J. observed as follows :—

"It is very clear that S. 27 qualifies S. 26. It is not clear that it qualifies S. 25. It is certain that it does not qualify S. 24, as to confessions made upon an improper inducement by a person in authority, within the meaning of that Section, when the accused person is not in the custody of a Police-officer. If the improper inducement was held out by a master to a servant, not being in the custody of a Police-officer S. 27 clearly would not apply. Whatever might be discovered upon the information given, the confession would be irrelevant. It can hardly be supposed that the Legislature intended that if the person accused had been arrested a statement made by him, while in custody, should be provable while a statement made by him while at liberty should be irrelevant. S. 24 is absolute as well as prohibitory in its terms. It excludes all confessions improperly induced by persons in authority from accused persons. The improper inducement (or threat) is the ground of exclusion. It regards as immaterial the person to whom the confession is made, and the circumstances whether the accused person is or is not in custody at the time."

On the other hand the matter came up for consideration before a Full Bench of the Allahabad High Court in the case of *Misri v. E*,⁷⁸ where it was held that S. 27 is a qualifying Section to Ss. 24, 25 and 26. The Calcutta High Court also, without referring to the above Allahabad case, independently came to the conclusion that S. 27 controls also S. 24. But *Lort-Williams, J.* in *Sup. and Rem. of Legal Affairs v. Bhajoo*, ante held that S. 27 is not a proviso to either S. 24 or S. 25.

The Lahore High Court has now held that S. 27 controls S. 24 as well as Ss. 25 and 26. It observes that the broad ground for not admitting confessions made under inducement or to a Police-officer is the danger of admitting false confessions, but the necessity for the exclusion disappears in a case provided by S. 27 when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.⁸⁰

76. (1885) 20 P. R. 15.

77. See also the Judgments of of Mahmood J in Babu Lal (1884) 6 A 509 (F. B.) : 4 A. W. N. 229 ; Nga San Ya (1909) 11 Cr. L. J. 41 : 4 I. C. 759 (Bur) ; Musst Luchoo (1873) 5 N. W. P. 86 ; Dhurum (1867) 8 W. R. 13 ; Bishoo (1868) 9 W. R. 16.

78. (1909) 31 A. 592 (F. B.) : 10 Cr. L. J. 212 : 3 I. C. 26. See also the Judgment of Straight, J. in Babu Lal (1884) 6 A. 509 (F. B.) : 4 A. W. N. 229 ; Thandraya (1902) 26 M. 38 : 2 Weir 733 ; Ganu Chandra (1931)

56 B. 172 : 33 Cr. L. J. 396 : A. I. R. 1932 B. 286 : 137 I. C. 174.

79. Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213 : 27 C. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321 [referring to Babu Lal (1884) 6 A. 509 (F. B.) : 4 A. W. N. 229]. See also Durlav (1931) 59 C. 1040 : 36 C. W. N. 373 : 33 Cr. L. J. 546 : A. I. R. 1932 C. 297 : 138 I. C. 116.

80. Bulaqi (1928) 9 L. 671 : 29 Cr. L. J. 1019 : A. I. R. 1928 L. 476 : 112 I. C. 347. See also Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J. 414 : A. I. R. 1929 L. 344 : 115 I. C. 6.

Fact deposed to, as discovered.—

The expression "fact" as defined in S. 3 includes not only the physical fact but also the psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in S. 27.⁸¹ The fact deposed to must be relevant to the case. Thus, where the accused, who was charged under S. 302 I. P. C., stated to the Police that "he had given *gur* to the deceased, and that with the *gur* he had administered some drug which he had with him and that with the same drug he had made an application for putting on a sore on the leg of Sibam Hajam of Adra," and the Police went to Sibam Hajam and got the medicine from him which after examination by Chemical Examiner was found to contain arsenic. The fact discovered that at some previous date the accused had treated one Sibam Hajam with arsenic for a bad leg was not relevant in any way to the present charge against him, and so it was held that the statement, which was clearly incriminating, was not admissible.⁸² On the other hand, it has been *held*, that S. 27 has nothing to do with the question as to whether the fact is or is not relevant and that question must be determined with reference to the other provisions of the Evidence Act.⁸³ The fact discovered must be one which, of its own force, independently of the confession, would be admissible in evidence; the discovery of a rope or stone which, save for the confession, would be altogether indifferent, cannot take a confession out of the excluding rule; its relevancy and probative force, both, must not be the offspring of the confession itself.⁸⁴ The discovery of a person who is afterwards proved to be a dacoit is not the discovery of a fact within the meaning of S. 27.⁸⁵ The fact that first information of the commission of an offence was discovered from information received from an accused in custody may be deposed to, but not his confession that he was concerned in the commission of that offence.⁸⁶ Accused gave information in these words: "I shall produce the *lathi* with which I killed Ismail." The *lathi* which the accused handed over had no marks of blood whatsoever. *Held*, that if the mere fact of the *lathi* having been handed over the Police might be relied upon, for the purpose of introducing an alleged confession made by the accused to the Police, the provisions of S. 26 would be nugatory.⁸⁷ The Court must not, under cover of the provisions of S. 27, allow the discovery of ordinary articles like *lathis*, knives, sticks, and clothes to be introduced under that Section, so as to admit what are practically confessions to the Police, and that the discovery ought to be of a fact which is directly connected with the crime itself.⁸⁸

The statement of the prisoner was "that he had robbed Krista of Rs. 48/- whereof he

81. Sukhan (1929) 10 L. 283 (F. B.): 30 Cr. L. J. 414; A. I. R. 1929 L. 344; 115 I. C. 6.
82. Gokul (1927) 6 P. 611; 28 Cr. L. J. 971; A. I. R. 1928 P. 22; 105 I. C. 683. *See also* Jora Hasji (1874) 11 B. H. C. R. 242.
83. Sukhan (1929) 10 L. 283 (F. B.): 30 Cr. L. J. 414; A. I. R. 1929 L. 344; 115 I. C. 6.
84. *In re Choda* (1867) 3 M. H. C. R. 318; 2 *Wair* 735.

85. Salam (1917) 14 N. L. R. 192; 19 Cr. L. J. 79; 43 I. C. 111.
86. Ram Dayal (1885) 20 P. R. 15.
87. Illahibux (1929) 31 Cr. L. J. 773; A. I. R. 1929 S. 175; 125 I. C. 201.
88. Phulua (1935) 18 N. L. J. 116; 37 Cr. L. J. 460; A. I. R. 1936 N. 23; 161 I. C. 8.

had spent Rs. 8/- and had Rs. 40/-". The prisoner's wife brought Rs. 40/- from his house and the prisoner surrendered the Rs. 40/- to the Police-officer. *Held*, that no facts deposed to were discovered by the aforesaid prisoner's statement.⁸⁹ Where the accused pointed out to the Police the places where certain acts were committed, *held*, that the evidence regarding it is not admissible under S. 27, because no fact was discovered in consequence of the information given.⁹⁰ When the accused pointed out, in the course of the Police investigation, a *dhutura* tree and said that he had taken the fruit of it, *held*, that the statement was inadmissible.⁹¹ Statement of the accused to the Police showing the place in the jungle where the rape took place, could not be admitted in evidence under S. 27, as it does not come under that Section.⁹²

Two guns, said to have been used in a dacoity and taken on loan by two accused, were, on information given by the accused that they had used them in a dacoity, recovered from persons who were both licence-holders and held licence covering the guns recovered from them. *Held*, it could not by any stretch of imagination be held that there was any discovery in the case of these guns within the meaning of S. 27.⁹³

When a Police-officer deposed to the fact that the accused, who was charged with murder, had stated to him that he and K had stolen some hides from C, and upon such statement he had sent for C, and recorded his information, and when it appeared that C had already informed the Police of the fact of the theft, though the witness was not aware of it: *Held*, that the statement was inadmissible upon the ground that it would be most dangerous to extend the provisions of S. 27, and allow a Police-officer, who is investigating a case, to prove an information received from a person accused of an offence in the custody of a Police-officer on the ground that a material fact was thereby discovered by him when that fact was already known to another Police-officer.⁹⁴

The accused was charged under S. 411 I. P. C. He was questioned by the Sub-Inspector and he offered to produce the stolen property. In consequence of these statements, a number of witnesses were taken by the accused to a field close to his house, and there, at a spot pointed out by the accused, the stolen *baguna* was dug out of the ground; then the accused took the party to the outer court-yard of his house, and pointed out a spot in a drain close by; further digging in the slope of a spot of the ditch at a place covered with rubbish brought to light an earthen pot containing Rs. 940,—declared by the accused to be part of the stolen Rs. 1000/-. *Held*, that the statement of the accused that the property in question had been kept concealed by him in the place pointed out, is admissible against him, that when the statement of the accused is a necessary preliminary to the fact discovered, it is admissible under S. 27 of the Evidence Act, and that the question whether the statement is sufficient to enable the

89. Adu Shikdar (1885) 11 C. 635.

90. Gaung Gyi (1908) 4 L. B. R. 244 : 8 Cr. L. J. 62 ; Ramani Mohan (1932) 34 Cr. L. J. 638 : A. I. R. 1933 C. 146 : 143 I. C. 797.

91. Panchu (1915) 13 A. L. J. 1077 : 17 Cr. L. J. 8 : 32 I. C. 136.

92. Ramani Mohan (1932) 34 Cr. L. J. 638 : A. I. R. 1933 C. 146 : 143 I. C. 797.

93. Bala Huddar (1931) 35 Cr. L. J. 594 : A. I. R. 1933 N. 252 : 148 I. C. 157.

94. Adu Shikdar (1885) 11 C. 635.

Police to make the discovery by themselves or is only of such a nature as to require further assistance of the accused to enable them to discover the fact, being immaterial.⁹⁵

P, accused of the murder of a girl, gave to a Police-officer a knife, saying it was the weapon with which he had committed the murder. He also said that he had thrown down the girl's anklets at the scene of the murder, and would point them out. On the following day he accompanied the Police-officer to the place where the girl's body had been found, and pointed out the anklets. *Held* by Straight, J., that such statements, being confessions made to a Police-officer, whereby no fact was discovered, could not be proved against P; that the anklets were not discovered in consequence of what he had said, for, on the contrary, the accused himself went with the Police, and pointed out the spot where they were lying;—in short it was by his own *act* and not from any *information* given by him, that the discovery took place. Stuart, C. J., on the other hand, *held* that, so far as the anklets are concerned, the statement that he had thrown down the anklets at the scene of the murder, was admissible.⁹⁶ The opinion of Straight, J. was followed in a Bombay case,⁹⁷ where the accused said they had concealed the grain (subject of theft) in a jar which they forthwith produced, and it was held that as the accused themselves produced the jar, it was by their own *act* and not from any *information* given by them that the discovery took place, and therefore S. 27 did not apply. The above cases were noticed by the Full Bench in the case of *Q. E. v. Nana*,⁹⁸ where the statement of the accused was that "he had buried the property in the fields"; he then took the Police to the spot where the property was concealed, and with his own hands disinterred the earthen pot in which the property was kept. Sargent, C. J., observed: "It is clear, that it was upon the information which the statement gave to the Police that they accompanied the accused to the spot where the earthen pot was disinterred by the accused containing the property, and it is equally clear that, if it had not been for this information, the property would not have been discovered, and it is, therefore, in accordance with the ordinary use of such terms to say that the discovery of the property in this case was "the consequence" of the information. It set the Police in motion, the immediate consequence being that the Police asked the accused to show them the spot and accompanied him there; but such a proceeding on the part of the Police was with a view to the discovery of the property, and was a natural consequence of the information they had received from him and so connected with the final result, viz., the discovery of the property as a *causa causans*. Whether the statement made by the accused is of such a detailed description as to enable the Police themselves to discover the property, or only of such a nature as to require his assistance in discovering the exact spot where the property is, cannot, in our opinion, affect the question.

95. Chema. (1897) 25 C. 413 : 2 C. W. N. 257 [dissenting from the judgment of Straight, J. in Pancham (1882) 4 A. 198 : 2 A. W. N. 21 and following Nana (1889) 14 B. 260 [F. B.]]

96. Pancham (1882) 4 A. 198 : 2 A. W. N. 21 [The judgment of Straight, J. has been dissented

from in Chema (1897) 25 C. 413 : 2 C. W. N. 257.]

97. Kamalia (1886) 10 B. 595.

98. (1889) 14 B. 260 (F.B.) [This case was followed in Chema (1897) 25 C. 413 : 2 C. W. N. 257; and in Huzuri (1908) 2 S. L. R. 27 : 10 Cr. L. J. 239.]

In both cases, there is the guarantee afforded by the discovery of the property for the correctness of the accused's statement and which is presumably the ground of the admissions of the exception to the general rule."

The accused made a statement during investigation by Police as to his having thrown a *darri* and a *gandasa* into the Canal. In consequence of the statement, the Police recovered the articles from a neighbouring village, having discovered from a boy the fact that the *darri* and *gandasa* had been found in the place pointed out to them by the accused. *Held*, that there was immediate connection between the statement and the discovery and the statement was admissible in evidence.⁹⁹

'Discovered'—Meaning of—Fact already discovered.—

The word 'discovered' is used in a peculiar sense. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of that fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of that fact.¹⁰⁰

Facts, already discovered, cannot be said to be discovered in consequence of an information received from an accused person. Thus, when a fact is discovered in consequence of information received from one of several persons charged with an offence, and when others give like information, the fact should not be treated as discovered from the information of A. B, and this will let in, under S. 27, only so much of the information as relates distinctly to the fact thereby discovered.¹⁰¹ It is not a proper course, where two persons are being tried, to allow a witness to state "they said this" or "they said that". It is certainly not at all likely that both the persons should speak at once, and it is the right of each of them to have the witness required to depose as nearly as possible to the exact words they individually used.¹⁰² Robertson and Rattigam, JJ. observed in *Muzammal v. Cr.* :—¹⁰³ "This Court and all other High Courts have pointed out time after time the futility of taking two persons *together* to point out murdered bodies, stolen properties and so on. How is it possible in most cases to say that one did not simply follow the lead of the other? This has been so frequently pointed out that we will not labour the point further. Had there been nothing but this evidence regarding the "joint" discovery it would not have been possible to decide which of the two had made the discovery, and the whole case against these two would have broken down."

99. Kapur Singh (1917) 98 P. L. R. 1918 : 20 Cr. L. J. 305 : 50 I. C. 481.

100. Karam Din (1929) 30 Cr. L. J. 385 : A. I. R. 1929 L. 338 : 115 I. C. 1.

101. Ram Churn (1875) 24 W. R. 36 ; Ram Singh (1915) 7 P. R. 1916 : 17 Cr. L. J. 273 : 34 I. C. 993 ; Budha (1921) 9 P. L. R. 1922 : 23 Cr. L. J. 22 : A. I. R. 1922 L. 315 : 64 I. C. 502 ; Adam Khan (1927) 28 P. L. R. 187 : 28 Cr. L. J. 456 : A. I. R. 1927 L. 739 : 101

I. C. 488 ; Bashya (1900) 2 Bom. L. R. 1089 ; Kudaon (1924) 21 N. L. R. 86 : 27 Cr. L. J. 60 : A. I. R. 1925 N. 407 : 91 I. C. 236.

102. Babu Lal (1834) 6 A. 509, 549 (F.B.) : 4 A. W. N. 229, per Straight, J.

103. (1908) 8 P. W. R. 1909 : 10 Cr. L. J. 321 : 3 I. C. 622. See also Pathana (1914) 63 P. L. R. 1914 : 15 Cr. L. J. 499 : 24 I. C. 587.

Joint discoveries are not admissible against any of the accused persons unless it can be shown who first made the discovery.¹⁰⁴

When a material fact, for instance, the manner in which a theft was committed, has already been discovered by some other means, an accused's subsequent statement relating to the same fact, while in the police custody, is not admissible against him under S. 27.¹⁰⁵ When things were not discovered on information received from the accused but they had been discovered by an accomplice, the conduct of the accused in this respect is inadmissible in evidence against him.¹⁰⁶ But the discovery referred to in S. 27 is discovery to or by Police-officers, and facts already known to persons other than Police-officers may be said to be discovered in consequence of information received, within the meaning of S. 27.¹⁰⁷ A fact known to the Police cannot be re-discovered on the statement of an accused so as to make such statement admissible.¹⁰⁸ Incriminating admissions of an accused before the Police-officers cannot be said to lead to the discovery of several places pointed out by the accused, where they are already known and cannot be said to have been 'discovered' in consequence of the said admissions with the meaning of S. 27.¹⁰⁹

In consequence of "Information"—Meaning of the word.—

The word 'information' cannot be used as synonymous with the word "statement". The word "information" as distinct from the word 'statement' connotes two things, namely, a statement or other means employed for imparting knowledge, possessed by one person to another and the knowledge so derived by the other person.¹¹⁰ The word seems to suggest that even if a single statement contains more information than what is contemplated in S. 24 of the Evidence Act, the statement is not to go in as a whole nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery.¹¹¹

The 'information' must precede the discovery, in order to be admissible.¹¹² Where there is no evidence to show that before the accused took out the property they or any of them said where it was buried, the stolen property taken out by them from the place where it was hidden cannot be said to be discovered in consequence of the information given by them

104. Faqira (1929) 30 Cr. L. J. 639 : A. I. R. 1929 L. 665 : 116 I. C. 619. See also Shivputraya (1930) 32 Bom. L. R. 574 : 31 Cr. L. J. 1104 : A. I. R. 1930 B. 244 : 126 I. C. 876 ; Durlav (1931) 59 C. 1040 : 36 C.W.N. 373 : 33 Cr. L. J. 546 : A.I.R. 1932 C. 297 : 138 I. C. 116.
105. Manna (1910) 3 P. W. R. 1911 : 12 Cr. L. J. 35 : 9 I. C. 232.
106. Pan Gang (1916) 19 Cr. L. J. 42 : 42 I. C. 1002 (Bur).
107. Lalit Mohan (1921) 49 C. 167 : 25 C. W. N. 788 : 22 Cr. L. J. 562 : 62 I. C. 578.
108. Wahid Bux (1929) 30 Cr. L. J. 1121 : A. I. R.

- 1929 S. 250 : 120 I. C. 81 ; Charagh Din (1934) 36 Cr. L. J. 313 : A. I. R. 1934 L. 786 : 153 I. C. 228.
109. Shamlal (1929) 31 Cr. L. J. 15 : A. I. R. 1929 N. 350 : 120 I. C. 210.
110. Karam Din (1929) 30 Cr. L. J. 385 : A. I. R. 1929 L. 338 : 115 I. C. 1.
111. Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213 : 27 Cr. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321.
112. Kamal (1872) 17 W. R. 50 ; Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213, 223 : 27 C. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321.

within the meaning of S. 27 and the fact that all the accused go together and take out the property has no value against any one of them.¹¹³

"In the custody of a Police Officer"—Meaning of.—

When a person states that he has done certain acts which amount to an offence, he accuses himself of committing the offence; and if he makes the statement to a Police-officer as such, he submits to the custody of the Officer within the meaning of S. 46(1) Cr. P. C., and is then in the custody of a Police-officer within the meaning of S. 27 of the Evidence Act.¹¹⁴ Where the accused, who was suspected after the first report had been made, made a statement and pointed out the dead body to the Police and his name was subsequently mentioned in the second report: *Held*, that the accused was not in any kind of custody at the time he made the statement and that it was consequently not admissible under S. 27.¹¹⁵ But if he was under detention as a suspect such a statement would be admissible.¹¹⁶ Though a person need not have been formally arrested before the recovery of incriminating articles, yet if that person has been suspected from the beginning and has apparently been treated as an accused, though no restraint on his movements has been imposed, still that person is in custody of the Police within the meaning of S. 27.¹¹⁷ As soon as an accused person or suspected person comes into the hands of a Police-officer he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of S. 26 and S. 27 of the Evidence Act. The idea of 'free detention' or absence of formal arrest is altogether mistaken, sometimes even hypothetical. It is an infringement of the spirit while appearing to conform to the strict letter of the law.¹¹⁸

Whether the accused was in custody or not is a question for the Judge.¹¹⁹

So much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.—

The judicial interpretations of the above words in S. 27 differ: Some have given them a wider scope and some have given them a restricted meaning. The difference lies in answering the question, *how much* of the information may be proved? The Bombay and Calcutta

113. Dito (1930) 33 Cr. L. J. 106 : A. I. R. 1931 S. 154 : 135 I. C. 267.

114. Santokhi (1932) 12 P. 241 (S. B.) : 34 Cr. L. J. 349 : A. I. R. 1933 P. 149 : 142 I. C. 474 [over-ruling Deonandan (1928) 7 P. 411 : 29 Cr. L. J. 790 : A. I. R. 1928 P. 491 : 111 I. C. 118; and referring to Lalit Mohan (1921) 49 C. 167 : 25 C. W. N. 788 : 22 Cr. L. J. 562 : 62 I. C. 578].

115. Jalla (1931) 32 P. L. R. 347 : 32 Cr. L. J. 650 : A. I. R. 1931 L. 278 : 131 I. C. 93. See Durlav (1931) 59 C. 1040 : 36 C. W. N. 373 : 33 Cr. L. J. 546 : A. I. R. 1932 C. 297 : 138 I. C. 116.

116. Nawab Din (1933) 34 P. L. R. 637 : 34 Cr. L. J. 683 : A. I. R. 1933 L. 516 : 144 I. C. 12.

117. Aishan Bibi (1933) 15 L. 310 : 36 Cr. L. J. 14 : A. I. R. 1934 L. 150 : 152 I. C. 206 [distinguishing Durlav (1931) 59 C. 1040 : 36 C. W. N. 373 : 33 Cr. L. J. 546 : A. I. R. 1932 C. 297 : 138 I. C. 116; and relying on Jalla (1931) 32 P. L. R. 347 : 32 Cr. L. J. 650 : A. I. R. 1931 L. 278 : 131 I. C. 93 and Maung Lay (1923) 1 R. 609 : 25 Cr. L. J. 381 : A. I. R. 1924 R. 173 : 77 I. C. 429].

118. Maung Lay (1923) 1 R. 609 : 25 Cr. L. J. 381 : A. I. R. 1924 R. 173 : 77 I. C. 429.

119. Bath and Jones (1910) 5 Cr. A. R. 177.

High Courts have generally given the words a restricted scope, and a Full Bench of the Lahore Court has recently done the same. The other High Courts have, in some cases, given the words a wider scope. We note below some of the important cases on the subject under the heading of the different High Courts which decided them. We notice, however, that lately the tendency has been towards giving the Section a restricted meaning.

Bombay High Court.—

It is not all statements connected with the production or finding of property which are admissible; those only which lead immediately to the discovery of property, and so far as they do lead to such discovery, are properly admissible. Whatever may be the nature of the fact discovered, that fact must, in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that that statement constituted the information through which the discovery was made, in order to render the statement admissible. Other statements, connected with the one thus made evidence and so mediately, but not necessarily or directly, connected with the fact discovered, are not to be admitted, as this would rather be an evasion than a fulfilment of the law, which is designed to guard prisoners accused of offences against unfair practices on the part of the Police. For instance, a man says: "You will find a stick at such and such a place, I killed Rama with it." A Policeman, in such a case, may be allowed to say he went to the place indicated and found the stick; but any statement as to the confession of murder would be inadmissible. If, instead of "You will find," the prisoner has said, "I placed a sword or knife in such a spot," when it was found, that too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to the discovery, and is thus distinctly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statement, as it has not furthered, must less caused, the discovery, is not admissible. The words in S. 27 of the Evidence Act, "whether it amounts to a confession or not" are to be read as qualifying the word "information" in the immediately preceding context, not the words "so much"; and the effect is that, although ordinarily a confession of an accused while in custody would be wholly excluded, yet if, in the course of such a confession, information leading to the discovery of a relevant fact has been given, so much of the information as distinctly led to this result may be deposed to, though as a whole the statement would constitute a confession which the preceding Sections are intended to exclude.¹²⁰

The accused was charged under S. 411 I. P. C. He, in answer to the question of the Police as to where the property was, replied, "Yes. I have kept it. I will point it out. I have buried it in the fields." He then took the Police to the spot where the property was concealed, said that he had buried it there and, with his own hand, disinterred an earthen pot in which the property was kept. *Held*, that the statement of the accused that he had buried the property in the fields distinctly set the Police in motion, and led to the discovery of the

property; that the statement that "he had kept" the property is not necessarily connected with the fact discovered, and was, therefore, not admissible and that a statement is equally admissible under S. 27, whether the statement is made in such detail as to enable the Police to discover the property themselves, or whether it be of such a nature as to require the assistance of the accused in discovering the exact spot where the property is concealed.¹²¹

A statement of a person accused of murder that he has burnt the clothes of the deceased and would show the Police where he had done so, and the clothes were shown to the Police, though it amounts at least to an admission of constructive guilt, is admissible under S. 27.¹²² The above case further held that a confession of a limited kind allowed by S. 27 may be taken into consideration against a co-accused under S. 30 of the Evidence Act.¹²³

In order that S. 27 may be applicable it is necessary to know exactly what the statements were as they are admissible only so far as they lead to the discovery of some fact and no further.¹²⁴ If the accused gives information to the Police in a form which divided the information under several heads, that which directly leads to the discovery will be admissible and the other heads will not be. If, on the other hand, he makes a compound statement, the Judge, before he records it as evidence or leaves it to the Jury, should divide the sentence into what are really its component parts and only admit that part which has led to the discovery of the particular fact. If the accused said: "I will produce the share I received in such and such a dacoity, the fact that there was a dacoity, that the accused took part in it, and that he got part of the proceeds are not admissible, but the statement, as to where the property is, will be."¹²⁵

Calcutta High Court.—

No judicial officer dealing with the provisions of S. 27 should allow one word more to be deposed to by a Police-officer detailing a statement made to him by an accused person, in consequence of which he discovered a fact, than is absolutely necessary to show how the fact that was discovered is connected with the accused so as in itself to be a relevant fact against him. S. 27 was not intended to let in a confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the fact or facts of which he gives evidence.¹²⁶ Thus, when a Police Officer deposed that an accused

121. Nana (1889) 14 B. 260 (F. B.).

122. Shivabhai (1926) 50 B. 683 : 27 Cr. L.J. 1140 : A. I. R. 1926 B. 513 : 97 I. C. 660.

123. In re Sankappa (1908) 31 M. 127 : 18 M. L. J. 66 : 7 Cr. L. J. 325 : Rama Birapa (1878) 3 B. 12.

124. Shivputraya (1930) 32 Bom. L. R. 574 : 31 Cr. L. J. 1104 : A. I. R. 1930 B. 244 : 126 I. C.

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125. Ganu Chandra (1931) 56 B. 172 : 33 Cr. L. J. 396 : A. I. R. 1932 B. 286 : 137 I. C. 174.

126. Adu Shikdar (1885) 11 C. 635 [endorsing the observations of Straight, J. in Babu Lal (1884) 6 A. 509 (F.B.) : 4 A. W. N. 229 ; and dissenting from the observations of Stuart, C. J. in Pancham (1882) 4 A. 198 : 2 A. W. N. 21. The case of Pagaree Shaha (1873) 19 W. R. 51 referred to by the Sessions Judge may be taken to be no longer good law.]

had told him that he had robbed K of Rs. 48/-, whereof he had spent Rs. 8/-, and had got Rs. 40/-, and that he had made over the Rs. 40/-, to him : *Held*, that the statement that he robbed K of Rs. 48/-, was not necessarily preliminary to the surrender of Rs. 40/-, and was inadmissible in evidence against him.¹²⁷ The word used in S. 27 is not "statement" but "information" and this seems to suggest that even if a single statement made by an accused person contains more information than what is contemplated in S. 24, the statement is not to go in as a whole, nor is it to go in as a statement at all, but what is admissible is the particular information given by the statement which has led to the discovery. If, therefore, an accused person were to state to a Police-officer that he killed A with a knife and concealed the dead body in that place, the further information that he himself had killed A is not admissible under S. 27.¹²⁸ A first information of murder was lodged with the Police by the accused himself and in it he stated among other things that he had committed the offence. *Held*, that the first information was not admissible in its entirety but so much of it as contained a narrative of events prior to the occurrence and the portion which led to the discovery of material evidence were admissible in evidence. Thus a Police-officer can depose that the accused went to him and stated "that his wife was lying wounded with a sword on the bed" but not the statement that he had severely hacked his wife.¹²⁹

*In Supdt. and Rem. of Legal Affairs v. Bhajoo Majhi*¹³⁰ Lort-Williams, J. observed that S. 27 is not a proviso to either S. 24 or S. 25 and the English law prevailing at the time when the Evidence Act was passed may be taken to continue in India. There the practice is to allow it to be stated in evidence that in consequence of information received from the prisoner certain facts had been discovered ; thus, to that extent fixing the prisoner with knowledge. It was held in this case that S. 27 must be strictly construed and any relaxation must be sparingly allowed, care being exercised to see that the purpose and object of Ss. 25 and 26 and the safe-guards provided in S. 27 are not rendered nugatory by a lax interpretation.

Madras High Court.—

If an accused makes a statement which is admissible under S. 27 of the Evidence Act the whole of the statement which leads to the discovery of the stolen property is admissible, and sentences should not be cut up so as to reduce the statement only to the actual words which the accused may use to express the fact that he had hidden the property. The statement of an accused, while in police custody, that he had in his possession certain stolen property is admissible in evidence even though he himself produces the property, and it makes no difference whether the accused himself digs out the property from the place where it is hidden or whether on information given by him some one else digs up the ground and produces the property.¹³¹ The test of the admissibility is : "Was the fact discovered by reason of the

127. Adu Shikdar (1885) 11 C. 635.

128. Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213 : 27 C. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321 [referring to Chema (1897) 25 C. 413 : 2 C. W. N. 257 and Nana (1889) 14 B. 260 (F. B.)]

129. Lalit Mohan (1921) 49 C. 167 : 25 C. W. N.

788 : 22 Cr. L. J. 562 : 62 I. C. 578. *But see* Surendra (1918) 16 A. L. J. 478 : 19 Cr. L. J. 935 : 47 I. C. 659.

130. (1929) 57 C. 1062 : 34 C. W. N. 106 : A. I. R. 1930 C. 291 : 125 I. C. 733.

131. *In re Sogiamuthu* (1925) 50 M. 274 : 27 Cr. L. J. 394 : A. I. R. 1926 M. 638 : 93 I. C.

information and how much of the information was the immediate cause of the fact discovered and as such a relevant fact". Thus, certain stolen clothes were recovered from information given by the accused, from certain witnesses. The statement of the accused was that he had deposited the clothes with the witnesses : *Held*, that the statement was admissible under S. 27.¹³² An accused person made the following statements, viz., that he and another accused stole the missing money from a *dabbi* and that the stolen money will be found in a heap of rubbish close to his house. Immediately after making these statements, he went to that rubbish heap in the presence of the constables and of witnesses and took out certain coins and metal plates similar to those kept in the *dabbi*. *Held*, that the statement that the accused himself committed the offence is not admissible in evidence ; but that the portion of the statement signifying that the property stolen from the *dabbi* about which the Police were then making an investigation, will be found in the rubbish heap, is a statement which is distinctly related to the discovery of the stolen property and is therefore clearly admissible.¹³³ The accused said that "he and accused No. 2 hid the ornaments in the fort and that he would show them." Then the accused, the Policemen and others went to the fort and at a spot 25 feet from the place where the body of the deceased was found, the accused removed some tiles and took out the ornaments which were identified as those of the deceased : *Held*, that the statement was admissible.¹³⁴ Confessional statements by the accused, while in police custody, are admissible under S. 27, if they lead to discovery of facts relevant to the question of the guilt of the accused. Thus, when a person charged with the murder of a woman whose corpse was found packed in a coir mattress, made a statement that a particular person sold the mattress and that another brought it to him, and pointed out the individuals : *Held*, that the statements were admissible, though of an incriminating character. (*Per* Cornish and Burn, JJ. ; *contra*, *per* Lakshmana Rao, J.)¹³⁵

Allahabad High Court.—

B presented himself at the police station and made a report, a record of which was entered in the Police register. In consequence of the report a Police-officer proceeded to the house of B and discovered in a room a corpse of a woman. *Held*, that under S. 27 the Police-officer was entitled to depose that the accused came to him at the time and place stated in the report

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| <p>42 [This case has been dissented from in Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J. 414 : A. I. R. 1929 L. 344 : 115 I. C. 6]. <i>But see</i> Lalit Mohan (1921) 49 C. 167 : 25 C. W. N. 788 : 22 Cr. L. J. 562 : 62 I. C. 578 ; and Shivputraya (1930) 32 Bom. L. R. 574 : 31 C. L. J. 1104 : A. I. R. 1930 B. 244 : 126 I. C. 876.</p> <p>132. <i>Commer Sahib</i> (1888) 12 M. 153 : 2 Weir 738 [referred to in Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J. 414 : A. I. R. 1929 L. 344 : 115 I. C. 6].</p> <p>133. <i>Mahjunathaya</i> (1914) 26 M. L. J. 352 : 15 Cr.</p> | <p>L. J. 533 : 24 I. C. 845 [following <i>Nana</i> (1889) 14 B. 260 (F. B.)]</p> <p>134. <i>In re Kallam</i> (1932) 56 M. 231 : 34 Cr. L. J. 481 : A. I. R. 1933 M. 233 : 143 I. C. 46 (relying on <i>Nana</i> (1889) 14 B. 260 (F. B.) ; and <i>In re Sogiamuthu</i> (1925) 50 M. 274 : 27 Cr. L. J. 394 : A. I. R. 1926 M. 638 : 93 I. C. 42].</p> <p>135. <i>Ramanuja</i> (1934) 58 M. 642 (F. B.) : 1934 M. W. N. 1479 : 36 Cr. L. J. 1442 : A. I. R. 1935 M. 528 : 158 I. C. 764 [But compare <i>Maganlal</i> (1933) 30 N. L. R. 269 : 35 Cr. L. J. 1097 : A. I. R. 1934 N. 71 : 150 I. C. 623].</p> |
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and said ; "I have killed my wife, her corpse is lying in my house," and that in consequence of this statement the woman's corpse was discovered as indicated.¹³⁶

Lahore High Court.—

The Legislature has prescribed two limitations in order to define the scope of the information provable against the accused : (1) The information must be such as has caused the discovery of the fact ; and (2) the information must "relate distinctly" to the fact discovered. The requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence. Thus, only that portion of the information is provable which was the immediate or proximate cause of the discovery of the fact. Anything which is not connected with the fact as its cause, or is connected with it, not as its immediate or direct cause but as its remote cause, does not come within the ambit of the Section and should be excluded. A was being tried under S. 302 I. P. C., for murdering B. The dead body was recovered from a well two days later. At the time of his disappearance B was wearing certain ornaments but these ornaments were not found on his body at the time of its recovery from the well. During the investigation A was alleged to have made a statement to the Police in these terms : "I had removed the *Karas*, had pushed the boy into the well, and had pledged the *Karas*. The *Karas* were recovered from Alla Din, which were identified as those worn by B at the time of his disappearance. *Held*, (*Per* Shadi Lal, C. J., Harrison, Tekchand, Dalip Sing and Agha Haidar, JJ.) that the statement that the accused had pledged with Alla Din the *Karas* subsequently recovered from the latter is admissible under S. 27 but that the rest of the incriminating statement can not be received in evidence ; *Contra* (*Per* Forde and Jai Lal, JJ.) that the information, "I had removed the *Karas* and had pledged the *Karas* with Alla Din," may be proved.¹³⁷ The above Full Bench further held that S. 39 of the Evidence Act cannot be invoked for the purpose of letting in a confession in respect of which the bar created by Ss. 24, 25, 26 Evidence Act has not been removed by S. 27 of the Evidence Act. When the body of a deceased person is discovered in consequence of information received from the accused, the statement of the accused to the Police that he in company with his father and brother had buried the body cannot be held to be inadmissible.¹³⁸ But a stricter interpretation was given to S. 27 in *Karam Din v. E.*¹³⁹ There, the accused stated,—

136. Surendra (1918) 16 A. L. J. 478 : 19 Cr. L. J. 935 : 47 I. C. 659. *But see* Lalit Mohan (1921) 49 C. 167 : 25 C. W. N. 788 : 22 Cr. L. J. 562 : 62 I. C. 578.

137. Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J. 414 : A. I. R. 1929 L. 344 : 115 I. C. 6 [overruling Harnam Singh (1928) 9 L. 626 : 29 Cr. L. J. 881 : A. I. R. 1928 L. 308 : 111 I. C. 561 ; and dissenting from *In re Sogiamuthu* (1925) 50 M. 274 : 27 Cr. L. J. 394 : A. I. R. 1926 M. 638 : 93 I. C. 42, and Lalji (1927) 6 P. 747 : 29 Cr. L. J. 106 : A. I. R. 1928 P.

162 : 106 I. C. 693]. *See also* Hashmat Khan (1934) 15 L. 856 : 36 Cr. L. J. 211 : A. I. R. 1934 L. 417 : 152 I. C. 998.

138. Saifal (1926) 8 L. L. J. 519 : 27 Cr. L. J. 827 : 95 I. C. 603. *See also* Mamun (1930) 31 Cr. L. J. 293 : A. I. R. 1930 L. 530 : 121 I. C. 728 ; Mela (1928) 10 L. L. J. 531 : 29 Cr. L. J. 967 : 112 I. C. 55.

139. (1929) 30 Cr. L. J. 385 : A. I. R. 1929 L. 338 : 115 I. C. 1 [dissenting from Harnam Singh (1928) 9 L. 626 : 29 Cr. L. J. 881 : A. I. R. 1928 L. 308 : 111 I. C. 561]. *See also* Kaka

"buried the shirt which was my share of the stolen property under the *bari* tree". The shirt was accordingly found under the tree. *Held*, that the fact that the accused buried that shirt or the fact that it was his share of the stolen property was not 'discovered' within S. 27. Both these statements rested purely on the credibility or otherwise of the accused's statements; the fact that it was his share of the stolen property did not relate distinctly to the fact discovered which was merely that a certain article was buried under a certain tree; these facts could not be proved and would not be admissible or relevant against the accused. Harrison and Dalip Singh JJ., who decided the above case had been parties to the Full Bench decision in *Sukhan v. E.* above, and it may be taken that this too strict a view has been modified, and the statement that "I buried the shirt" may be held to be admissible. It was held in one case that under S. 27, it is quite legitimate to record evidence that an accused person said, "I shall point out certain property," if that statement leads to a discovery, but it is not legitimate to record as evidence that an accused person said, "I will point out certain property which I obtained as my share of the booty in the dacoity".¹⁴⁰ Where the accused stated to the Police, "I will point out the spot where I committed the murder", and thereafter he conducted the Police to a spot where the earth was found saturated with blood: *Held*, that the words "where I committed the murder" did not themselves distinctly relate to the discovery of the spot and that the words were not admissible in evidence against the accused.¹⁴¹

Patna High Court.—

Where the accused, when he was asked by the Sub-Inspector where the weapon with which he committed the offence was, replied that he threw the weapon at a certain place and the weapon was subsequently discovered at the place, the statement of the accused is admissible under S. 27 of the Evidence Act.¹⁴² The protection given to the accused by Ss. 24, 25 and 26 should not be dependent on the ingenuity of the Police-officer or the folly of the prisoner in composing the sentence which conveys the information. On the other hand, the statement made to the Police-officer cannot be garbled so as to be rendered absolutely innocuous to the prisoner and removed entirely from the nature of a confessional statement. Thus, where the accused had made a statement to the Police to the effect that he had put the corps of the victim in a colliery mine, and in consequence of this information the dead body was found in the place indicated: *Held*, that the statement was receivable in evidence.¹⁴³

Other High Courts or Chief Courts.—

Where stolen property is said to have been discovered from a confession of the accused made to the Police, only so much of the confessional statement as led directly to such discovery

Singh (1908) 3 P. W. R. 52 : 8 Cr. L. J. 460 ;
 Sulakhan Singh (1924) 26 Cr. L. J. 1429 :
 A. I. R. 1926 L. 138 : 89 I. C. 901.
 140. Gurdit Singh (1917) 52 P. L. R. 1918 : 19 Cr.
 L. J. 439 : 44 I. C. 967.
 141. Tara Singh (1915) 11 P. R. 1915 : 16 Cr.
 L. J. 545 : 29 I. C. 817.

142. Lalji (1927) 6 P. 747 : 29 Cr. L. J. 106 : A. I. R.
 1928 P. 162 : 106 I. C. 698 [dissented from in
 Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J.
 414 : A. I. R. 1929 L. 344 : 115 I. C. 6].
 143. Sonaram (1930) 10 P. 153 : 32 Cr. L. J. 792 :
 A. I. R. 1931 P. 145 : 131 I. C. 797 [discussing
 Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J.

is admissible under S. 27 but not his statement that it was stolen property.¹⁴⁴ The statement was "the hatchet with which the murder was committed is in a *nala*." Smith, J. *held*, that the words "with which the murder was committed" should not be allowed to come in in evidence as they did not lead to the discovery of the hatchet. Allsop, J., *held*, that those words were admissible. He observed, "The witness should, as far as possible, depose to the actual words used by the accused. If it was the intention of the Legislature that words of this kind should be omitted, it is difficult to understand why the words 'whether it amounts to a confession or not' should have been included in S. 27 ; because it is hard to conceive of any case when a bare statement that a certain article was in a certain place or in the possession of certain person would amount to a confession at all. If all that a witness can prove is that the accused said that a certain article was in a certain place, that would amount to little more, if anything, than saying that the article was discovered in consequence of information given by the accused."¹⁴⁵

Only so much of the information given by the accused as relates distinctly to the fact thereby discovered can be proved.¹⁴⁶ The statement of the accused was, "I shall produce the lathi with which I killed Ismail". The lathi which the accused handed over had no marks of blood whatsoever. *Held*, that the statement is inadmissible ; that if the mere fact of the lathi having been handed over to the Police might be relied upon, for the purpose of introducing an alleged confession made by the accused to the Police, the provision of S. 26 would become nugatory.¹⁴⁷

Under S. 27 only statements bearing directly on the recovery of property are admissible ; statements which only have an indirect bearing in giving the Police a fresh starting point for investigation cannot be admitted. Where A says he gave the revolver to B, B states he gave it to C, C to D and D to E, and the recovery is made from E and all the five persons were accused : *Held*, that only the statements of D bearing directly on the recovery of property was admissible. What is discovered in respect of each statement except the last is not the property itself, but the fact that the property has been handed over to some one else ; statements under S. 27 cannot be extended to include statements concerning the source from which the article recovered was obtained.¹⁴⁸ The protection given to an accused person by Ss. 24, 25 and 26 of the Evidence Act should not be dependent upon the ingenuity of the Police Officer or the folly of

414 : A. I. R. 1929 L. 344 : 115 I. C. 6 ; and Bhajoo (1929) 57 C. 1062 : 34 C. W. N. 106 : A. I. R. 1930 C. 291 : 125 I. C. 733].

144. Manna Lal (1923) 25 Cr. L. J. 49 : A. I. R. 1925 O. 1 : 75 I. C. 753. *But see* In re Sogiamuthu (1925) 50 M. 274 : 27 Cr. L. J. 394 : A. I. R. 1926 M. 638 : 93 I. C. 42.

145. Khitali (1933) 10 O. W. N. 937 : 35 Cr. L. J. 192 : A. I. R. 1933 O. 404 : 146 I. C. 905.

146. Mohammed Yusif (1929) 31 Cr. L. J. 1026 : A. I. R. 1930 S. 225 : 126 I. C. 449 [referring to Sukhan (1929) 10 L. 283 (F.B.) : 30 Cr. L. J.

414 : A. I. R. 1929 L. 344 : 115 I. C. 6] ; Ghandalal (1933) 28 S. L. R. 41 : 36 Cr. L. J. 704 : A. I. R. 1934 S. 159 : 154 I. C. 1038.

147. Illahibux (1929) 31 Cr. L. J. 773 : A. I. R. 1929 S. 175 : 125 I. C. 201. *See also* In re Choda (1867) 3 M. H. C. R. 318 : 2 Weir 735.

148. Maganlal (1933) 30 N. L. R. 269 : 35 Cr. L. J. 1097 : A. I. R. 1934 N. 71 : 150 I. C. 623 [But compare Ramanuja (1934) 58 M. 642 (F. B.) : 1934 M. W. N. 1479 : 36 Cr. L. J. 1442 : A. I. R. 1935 M. 528 : 158 I. C. 764].

the prisoner in composing the sentence which conveys the information. On the other hand, the statement made to the Police should not be garbled so as to render it absolutely innocuous to the prisoner and remove it entirely from the nature of a confessional statement. The Court should not under cover of this provision allow the discovery of ordinary articles like *lathis*, knives, sticks and clothes to be introduced so as to admit what are practically confessions to the Police, and the discovery ought to be of a fact which is directly connected with the crime apart from the statement itself.¹⁴⁹

S. 27 and S. 8 of the Evidence Act.—

S. 27 does not profess to deal with evidence as to the conduct or act of the accused, which is admissible under S. 8 or any of the preceding Sections of the Evidence Act and is subject to no limitation so long as it is relevant.¹⁵⁰ In the above case the facts were that the accused took the Police and others to a certain place and then pointed out and produced certain ornaments which were proved to have been worn by the murdered child immediately before its disappearance. It was found as a fact that the accused did so, on getting a promise from the Police-officer, that if she produced the ornaments she would be left off. The Full Bench observed that what it would have to consider was not admissibility of statements, if any, made by the accused person, but merely, whether evidence as to the conduct and acts of the accused, resulting from, or at any rate committed before, the inducement from the Police-officer could be said to have been fully removed, was or was not admissible.

In the course of the police investigation the accused in reply to an enquiry by the Police as to where he had kept the stolen property, said: "I have kept it. I will point it out. I have buried it in the fields." Accused then took the Police to the spot where the property was concealed, said that he had buried it there, and, with his own hand, disinterred an earthen pot in which the property was kept. It was *held*, that the above statements were clearly in the nature of confessions, and neither of them was admissible under S. 8 Exp. (1) as evidence of the conduct of the accused; that S. 8 must be read in connection with Ss. 25 and 26, and cannot admit a statement, as part of the evidence, which would be shut out by those Sections, and that the statement that "he had buried it there" was admissible under S. 27.¹⁵¹

The conduct of a prisoner in relation to any relevant fact is good evidence according to S. 8 of the Evidence Act; but according to Expl. 1, "the word 'conduct' in this Section does not include statements unless those statements accompany and explain acts other than statements". It is on such a statement that the significance of the act which it accompanies

149. Phulua (1935) 31 N. L. R. 256 : 37 Cr. L. J. 460 : A. I. R. 1936 N. 23 : 161 I. C. 8 [relying on Sukhan (1929) 10 L. 283 (F. B.) : 30 Cr. L. J. 414 : A. I. R. 1929 L. 344 : 115 I. C. 6 ; Sonaram (1930) 10 P. 153 : 32 Cr. L. J. 792 : A.I.R. 1931 P. 145 : 131 I. C. 797 ; and Ganu

Chandra (1931) 56 B. 172 : 33 Cr. L. J. 396 : A. I. R. 1932 B. 286 : 137 I. C. 174].

150. Misri (1909) 31 A. 592 (F. B.) : 10 Cr. L. J. 212 : 3 I. C. 26.

151. Nana (1889) 14 B. 260 (F. B.).

in many cases wholly depends. But if, under cover of an explanation said to have been given by a prisoner of an act in itself ambiguous, or not so obviously connected with a fact in issue as to be relevant, it is sought to introduce a confession of a prisoner to the Police, or made while in custody of the Police, the Evidence Act does not warrant its admission. The rules of exclusion and the exception to them being definitely laid down, the exception is not to be extended to cases not properly falling within it. The giving up by a cultivator of a bill-hook, or the pointing out of a place where *bagri* appears to have been trampled is, however, in itself, an unambiguous act. It is, in general, also insignificant. It needs no explanation, and a confession accompanying it does not explain it, but is a collateral matter, whose exclusion, where it is excluded, is not prevented by its being connected with matters that are not excluded.¹⁵² A confession of murder, made to a police constable, is not at all confirmed by the prisoner's saying, "that is the place when I killed the deceased", and when, starting from the pointing to a ditch or a tree, a long narrative of transactions, some of them altogether remote from any connection with the spot indicated, is allowed to be deposed to as confessed by a prisoner, the intention of the Evidence Act is not fulfilled but defeated. There was nothing to show that any discovery was made through information given by the prisoner nor has any act done by the prisoner been so explained by his statements as to receive from those statements a character which otherwise it might not have, and a character of importance for the case in hand so as to make those statements admissible as what is commonly called part of the *res gestae* under S. 8 of the Evidence Act. There is hardly any act that a prisoner could do to which a statement relevant to a crime charged against him could not, by a more or less forced connection, be attached. The Evidence Act does not intend to suggest or sanction such a process, but to make those statements admissible and those only, which are the essential complements of acts done or refused to be done, so that the act itself or the omission to act acquires a special significance as a ground for interference with respect to the issue in the case under trial. It is important that this should be borne in mind, as otherwise prisoners will, by the exercise of the commonest ingenuity, be entirely deprived of the safeguards which the Legislature intended to throw round them in Sections 24 to 26 of the Evidence Act."¹⁵³ Where the Investigating-officer in a dacoity case was allowed to depose that the accused pointed out to him the route taken by him and his comrades in going to the place where the dacoity was committed and also the place where they divided the booty and the place where they first met, *held* that this was evidence of confessional statements made before the Police and were therefore inadmissible.¹⁵⁴

The effect of an accused's pointing out to the Police the spot where certain acts were committed is merely to accentuate or particularize the accused's verbal statements made to the same effect. The conduct of the accused in doing so is nothing more than making a statement by signs instead of words, and should be treated as part of his statement, and if the prosecution relies on such statement as being true, *e.g.*, to show that the accused had an accurate knowledge

152. Jora Hasji (1874) 11 B. H. C. R. 242.

153. Rama Birapa (1878) 3 B. 12, per West J.

154. Sheikh Abdul (1924) 26 Cr. L. J. 606 : A. I. R. 1925 C. 887 : 85 I. C. 830.

of the circumstances, such statements are incriminating statements in the nature of confession and are inadmissible in evidence.¹⁵⁵ But where an accused person accompanies a Police-officer and points out the spot where the stolen property is hidden, it amounts to conduct, proof of which is admissible under S. 8 of the Evidence Act.¹⁵⁶ Where things were not discovered on information received from the accused, but they had been discovered by an accomplice, the conduct of the accused in this respect is inadmissible in evidence against him.¹⁵⁷

Instances of Misdirection.—

The prisoner was charged under Ss. 380 and 457 I. P. C. There was evidence tracing the stolen property to the possession of the prisoner, and also evidence of certain statements with reference to it. The statement made by the prisoner was that 'he had deposited the clothes produced with the witnesses who delivered them on his demand'. The Judge in his charge to the Jury said:—"You must take the bare fact that the prisoner said that certain articles were found with certain persons; not that he said that he had himself left them with these persons." *Held*, that this was a misdirection; that the statement of the prisoner that he had deposited the clothes with the witnesses, was the proximate cause of their discovery and was admissible in evidence; that the test of the admissibility under S. 27, is, "was the fact discovered by reason of the information, and how much of the information was the immediate cause of the fact discovered, and as such a relevant fact?"¹⁵⁸

Where a Sessions Judge told the Jury that confessions to the Police, if followed by the production of stolen property, were inadmissible, it was said that it amounted to a misdirection. It was said, "He should have pointed out that such confessions are only admissible in so far as they relate distinctly to the fact thereby discovered. Evidence of such confession should not be allowed to be given or recorded to any greater extent; nor when such evidence as is properly admissible has been recorded, should the Jury afterwards be told generally that the prisoners had confessed."¹⁵⁹

Under Ss. 27 and 30 of the Evidence Act, a confession made by an accused can be taken into consideration against another accused when such confession is the immediate cause of the discovery of some fact relevant against such other accused; and a direction to the Jury to take such confession into consideration, where it is not the immediate cause of any such discovery, is a misdirection.¹⁶⁰

155. *Gaung Gyi* (1908) 4 L. B. R. 244 : 8 Cr. L. J. 62.

156. *Nga Aung Ba* (1916) 17 Cr. L. J. 402 : 35 I. C. 962 (Bur).

157. *Pan Gang* (1916) 19 Cr. L. J. 42 : 42 I. C. 1002 (Bur).

158. *Commer Sahib* (1888) 12 M. 153 : 2 Weir 738 [referring to *Adu Shikdar* (1885) 11 C. 635, *Pancham* (1882) 4 A. 198 : 2 A. W. N. 21 and *Jora Hasji* (1874) 11 B. H. C. R. 242].

This case was referred to in *Sukhan* (1929) 10 L. 283 (F. B.) : 30 Cr. L. J. 414 : A. I. R. 1929 L. 344 : 115 I. C. 6.

159. *In re Acchabba Beori* (1908) 18 M. L. J. 358 : 7 Cr. L. J. 358.

160. *In re Sankappa* (1908) 31 M. 127 : 18 M. L. J. 66 : 7 Cr. L. J. 325. See also *Shiyabhai* (1926) 50 B. 683 : 27 Cr. L. J. 1140 : A. I. R. 1926 B. 513 : 97 I. C. 660.

If a confession is inadmissible under S. 24 of the Evidence Act, the Jury may be directed to consider any statements in it relating to the discovery of any article, under S. 24 of the Evidence Act.¹⁶¹

It is a misdirection for the Judge to leave it to the Jury to decide whether certain statements made by the accused or how much thereof are admissible in evidence ; the Judge's instructions to the Jury to take into consideration, against the accused, statements of the co-accused as their 'confessions,' 'confessional statement' or 'confessions of a sort,' when as a matter of fact those statements were not self-incriminatory, amounts to misdirection.¹⁶²

S. 30, Evidence Act.

Where the Judge failed to give any direction as to how the Jury should treat, and the weight they should give, to the evidence of an accused person against a co-accused, the verdict was set aside and re-trial ordered.¹⁶³ The Sessions Judge errs in omitting to instruct the Jury that, as regards each prisoner, the confession of his fellow-prisoner was, at best, the evidence of an accomplice. The Judge should tell the Jury not only that the confession of a co-accused is to be rated and valued at best as accomplice's testimony, but further that the confession is evidence of a peculiarly infirm and defective character requiring specially careful scrutiny before it could be safely relied on.¹⁶⁴ In the case just cited Phear, J. observed : "It is true that the instance of corroboration which is appended to illustration (b) of S. 114 (Evidence Act) is corroboration to be found in accounts of an occurrence given by accomplices ; but it is noticeable that the Legislature expressly makes it a condition to the validity of this corroboration, that these accomplices should have been "captured on the spot, and kept apart from each other" and moreover there is not the slightest indication that the Legislature intended in this passage by the term "accounts given by the accomplices" anything other than accounts given in the course of their examination as witnesses. In view, therefore, of the stringent condition which the Legislature has here prescribed as essential to the corroborative force of the accomplice's account, we think that the mere confession of the prisoners tried simultaneously with the accused for the same offence, which are in a very qualified manner made operative as evidence by S. 30, do not come within the scope of this legislative declaration that, under the special circumstances mentioned, the account given by one accomplice may be treated as corroboration of the account given by another.¹⁶⁵ Before a confession of a person jointly tried with the prisoner can be taken into consideration against such prisoner, it must appear that the confession implicates the confessing person substantially to the same extent as it implicates the person against whom it is to be used in the commission of the offence for which the prisoners are being jointly tried. Where, therefore, the Judge wrongly directed the Jury to take into consideration the statements of the co-accused who

161. Thandraya (1902) 26 M. 38, 40 : 2 Weir 733.

162. Amiruddin (1917) 45 C. 557 : 22 C. W. N. 213 : 27 C. L. J. 148 : 19 Cr. L. J. 305 : 44 I. C. 321.

163. Bikram Ali (1929) 57 C. 801 : 50 C. L. J. 467 :

31 Cr. L. J. 610 : A. I. R. 1930 C. 139 : 124 I. C. 66.

164. Sadhu Mundul (1874) 21 W. R. 69.

165. See per Jackson J. in Ashootosh (1878) 4 C. 483 (F. B.) : 3 C. L. R. 270.

did not implicate themselves to the same extent as they implicated the accused; *Held*, that it was a serious misdirection and vitiated the verdict.¹⁶⁶ Where a co-accused in his confession does not substantially implicate himself to the same extent as the other accused but on the contrary tries to minimize, as far as he can, the part he took, the Judge should tell the Jury that they should not take the confession of the first accused against the other accused.¹⁶⁷ Where a so-called confession is not really a confession but a self-exculpatory statement, it is a misdirection to place it before the Jury, though they are informed as to S. 30 of the Evidence Act and told,—“The principle underlying the Section is that when a person makes a confession implicating himself and others to the same extent, the fact of self-implication which affords some guarantee is weakened, as in the present case the accused makes the others take a much more prominent part in the dacoity than he himself took and says that he was forced by the others to take them to Hazari’s house and it is still further weakened, as here, where the accused has retracted the confession.”¹⁶⁸

Under S. 30 of the Evidence Act, the confession of a prisoner affecting himself and another person charged with the same offence is, when duly proved, admissible as evidence against both, but such second person cannot, when it is uncorroborated as against him, be legally convicted on it.¹⁶⁹ In such a case if there is no other evidence the Sessions Judge ought to direct the Jury to acquit the prisoner.¹⁷⁰ He should direct them that such confessions are not legally sufficient for conviction, unless corroborated by other independent evidence, both as to the *corpus delicti* and to the identity of the accused, and his omission to do so is material misdirection. So, where a Sessions Judge charged the Jury as follows: “It is a rule of law that where a person confesses a crime and implicates himself, if he implicates the persons who have been tried along with him to the same extent as he implicates himself, there if you accept his statement as being true and voluntarily given as against himself, you can safely accept it as true against the other persons.” *Held*, that as the Judge did not caution the Jury that such confession should be corroborated before it could be accepted, it amounted to a misdirection.¹⁷¹ A direction that the confession of a co-accused is the evidence of an accomplice under S. 133 of the Evidence Act, and that the Jury can act on it, though uncorroborated, vitiates the verdict.¹⁷²

A confession, to be used against others under S. 30, Evidence Act, must be a confession

166. *Belat Ali* (1873) 19 W. R. 67 [referring to *Mohesh* (1873) 19 W. R. 16]; *Jaffir Ali* (1873) 19 W. R. 57; *Amrita Govinda* (1873) 10 B. H. C. R. 497 (principal and abettor).
 167. *Sivasami* (1910) 1 M. W. N. 754 : 11 Cr. L. 701 : 8 I. C. 719.
 168. *Bhadreswar* (1928) 32 C. W. N. 731 : 47 C. L. J. 526 : 29 Cr. L. J. 527 : A. I. R. 1928 C. 416 : 109 I. C. 351.
 169. *Ashootosh* (1878) 4 C. 483 (F. B.) : 3 C. L. R. 270. *See also* *Ambigara* (1876) 1 M. 163 : 2 Weir 740 : *Dosa Jiva* (1885) 10 B. 231.

170. *Per Garth C. J.* in *Ashootosh* (1878) 4 C. 483 (F. B.) : 3 C. L. R. 270; *Gangapa* (1913) 38 B. 156, 176 : 14 Cr. L. J. 625 : 21 I. C. 673.
 171. *Ashootosh* (1878) 4 C. 483 (F. B.) : 3 C. L. R. 270; *In re Giddigadu* (1909) 33 M. 46 : 9 Cr. L. J. 405 : 1 I. C. 867. *See also* *Kuppan* (1909) 9 Cr. L. J. 308 : 1 I. C. 547 (M); *Kalwa* (1926) 48 A. 439 : 27 Cr. L. J. 746 : A. I. R. 1926 A. 377 : 95 I. C. 74.
 172. *Moyez* (1924) 40 C. L. J. 551, 553 : 26 Cr. L. J. 360 : A. I. R. 1925 C. 405 : 84 I. C. 712.

in the strict sense of the term. Otherwise, the Judge cannot place it before the Jury as evidence to be considered against a co-accused; and if he does so he commits a serious error.¹⁷³ Statements of some of the accused persons, which do not amount to a confession, and which do not in any way incriminate them, are not admissible in evidence against any person other than those making them. Omission to direct the Jury that, in dealing with the evidence against the accused other than those making the statements, they are not to take into consideration such statements, also amounts to misdirection.¹⁷⁴

There is nothing in S. 30 which prevents a Court from convicting, after taking the confession of a co-accused into consideration. But the High Courts in India have laid down a rule of practice, which has all the reverence of law, that a conviction founded solely on the confession of a co-accused cannot be sustained—*Per Macleod, J.* The confession of a co-accused may be taken into consideration along with other evidence in the case, but if there is no evidence in the case, outside these statements, no conviction based only upon the confession of the co-accused is good in law. Obvious considerations of justice require that a Court, before acting upon such statements, should insist upon independent corroboration from other evidence in the case in material particulars, particularly as to identity—*Per Shah, J.* A Judge sitting with a Jury has a discretion either to withdraw the confession from the Jury, or to put it before them with the direction that they ought to acquit unless it is corroborated in material particulars—*Per Macleod, J.*¹⁷⁵ The failure of a Judge to unambiguously warn the Jury against taking the retracted confession of an accused into consideration as against a co-accused amounts to misdirection.¹⁷⁶ The corroboration in material particulars required must come from evidence which is not tainted as the evidence of an accomplice.¹⁷⁷

It is a misdirection, misleading the Jury and causing a miscarriage of justice, to put to them as against the accused a statement by a co-accused which is not strictly a confession of the offence charged.¹⁷⁸

It is a misdirection to put before the Jury that a retracted confession of a co-accused to the Police which was not the immediate cause of discovery within S. 27, Evidence Act.¹⁷⁹

The Judge should tell the Jury that a retracted confession of a co-accused is practically of no value against the accused.¹⁸⁰ The omission to point out that a retracted confession should not be acted upon as against a co-accused without the fullest corroboration is a

173. *Amrita Govinda* (1873) 10 B. H. C. R. 497, 501.

174. *Taju Pramanik* (1898) 25 C. 711; 2 C. W. N. 369; *Sourendra* (1905) 10 C. W. N. 153; 3 Cr. L. J. 144.

175. *Gangapa* (1913) 38 B. 156; 14 Cr. L. J. 625; 21 I. C. 673 (*Contra per Heaton, J.*)

176. *In re Ibrahim* (1925) 42 C. L. J. 496; 26 Cr. L. J. 1146; A. I. R. 1926 C. 374; 88 I. C. 458.

177. *Kashem Ali* (1932) 36 C. W. N. 874; 34 Cr. L. J. 23; A. I. R. 1933 C. 6; 140 I. C. 379.

178. *Amiruddin* (1927) 45 C. 557; 22 C. W. N. 213; 27 C. L. J. 148; 19 Cr. L. J. 305; 44 I. C. 321.

179. *In re Sankappa* (1908) 31 M. 127; 18 M. L. J. 66; 7 Cr. L. J. 325.

180. *In re Ibrahim* (1925) 42 C. L. J. 496, 498; 26 Cr. L. J. 1146; A. I. R. 1926 C. 374; 88 I. C. 458.

misdirection.¹⁸¹ A retracted confession should practically carry no weight as against the person other than the maker, because it is not made on oath, it is not tested by cross-examination and its truth is denied by the maker himself who has lied on one or other of the occasions and the very fullest corroboration would be necessary in such a case, far more than would be demanded for the sworn testimony of an accomplice on oath.¹⁸² Under S. 30 of the Evidence Act the confession may be taken into consideration against a co-accused, but this is not tantamount to saying that such confession is to take the place of proof. On the other hand it must be remembered that the confession of a co-accused is even worse than the sworn testimony of an accomplice ; and if it is necessary that the latter testimony should be corroborated both as to the crime and as to the criminal, it is still more necessary that the confession of a co-accused should be so corroborated, and when that confession is retracted, it has no value at all against the co-accused.¹⁸³

A confession, inadmissible in evidence against the person making it, may be admitted in evidence in favour of the co-accused.¹⁸⁴

S. 32(1), Evidence Act.

Dying Declaration.—

The dying statement of a deceased person must be taken in the presence of the accused, and unless he was so examined by the Deputy Magistrate exercising judicial jurisdiction, the writing made by such Magistrate could not be admitted to prove the statement made by the deceased. This statement must have been proved in the ordinary way by a person who heard it made. If the Deputy Magistrate had been called to prove it, he might have refreshed his memory with the writing made by himself at the time when the statement was made.¹⁸⁵ Witnesses should not be allowed to prove a dying declaration as if it is a substantial piece of evidence in the case. The relevant fact to be proved is the statement made by the deceased person and that statement is not the document made by the Magistrate, but the verbal statement made by the deceased person. The only way of proving a dying declaration is by the oral evidence of some witness, who heard it made and who can refresh his memory by referring to the note made by him and read over by him at or about the time the statement is made. A declaration made by a person in expectation of death in the absence of the accused and

181. Hemanta (1919) 47 C. 46 : 30 C. L. J. 29 : 21 Cr. L. J. 775 : 58 I. C. 455.

182. Moyez (1924) 40 C. L. J. 551 : 26 Cr. L. J. 360 : A. I. R. 1925 C. 406 : 84 I. C. 712.

183. Kasimuddin (1934) 62 C. 312 : 39 C. W. N. 27 : 36 Cr. L. J. 485 : A. I. R. 1934 C. 853 : 154 I. C. 273.

184. Pitambar (1877) 2 B. 61 : Basvanta (1900) 25 B. 168 : 2 Bom. L. R. 761.

185. Samiruddin (1881) 8 C. 211 : 10 C. L. R. 11. See also Daulat Kunjra (1902) 6 C.W.N. 921 ; Tafiz Pramanik (1929) 50 C. L. J. 584 : 31 Cr. L. J. 916 : A. I. R. 1930 C. 228 : 125 I. C. 743 ; Sarat Chandra (1924) 52 C. 446 : 26 Cr. L. J. 1244 : A. I. R. 1925 C. 821 : 88 I. C. 800 [following Samiruddin (1881) 8 C. 211 : 10 C. L. R. 11.

recorded, in a language different from the one in which it is made, by an officer who is not examined in the case, cannot properly be used as evidence against the accused.¹⁸⁶ It is not necessary that the person recording the statement should repeat exactly what was said. If the person certifies in Court that he recorded it correctly, it is admissible in proof of its own contents.¹⁸⁷

Where a dying declaration is recorded by a Magistrate, the writing itself is not evidence, but the precise statement made by the deceased must be proved by the Magistrate who recorded the statement or by some one who heard it. S. 91, Evidence Act, does not apply to such a statement.¹⁸⁸ Where the Magistrate who recorded it has since died, the writing made by him cannot be admitted to prove the declaration; it must be proved in the ordinary way by a witness who heard it made; and if he swears that the written statement correctly reproduces the words used by the deceased and was read over to the deceased who admitted its correctness, it is sufficient to prove that he did use the words contained in that statement.¹⁸⁹ Dying declaration recorded by a Magistrate other than the committing Magistrate is not admissible in evidence unless and until it has been proved by the Magistrate who recorded it. A note in the order-sheet that it was admitted without any objection on the part of the accused does not make any difference.¹⁹⁰ Where the Police-officer, who recorded a dying declaration, was not asked to prove the oral statement made to him, and did not do so, but the record was itself admitted in evidence, on his deposing that he had read it over to the declarant, who admitted it to be correct and gave his thumb-impression; and where the record was read over to the attesting witness who also deposed to the same effect but added that he could not recollect whether the names of the assailants in the record were those actually mentioned by the declarant; and objection was taken at the hearing of the appeal in the High Court to the admissibility of the record; the High Court, without deciding whether the record was legally admitted, and whether the cases of *Gouridas v. E.*¹⁹¹ and *E. v. Balaram Das*¹⁹² (noted *ante*) were rightly decided or not, directed proof of the contents of the record, if possible, in accordance with the ruling in *E. v. Samiruddin* (8C. 211).¹⁹³

From the cases referred to in the aforesaid decision¹⁹⁴ it may appear that there is some difference of opinion as to the way in which a dying declaration should be proved. This

186. Mathura (1901) 6 C. W. N. 72.

187. Partap (1925) 7 L. 91 : 27 Cr. L. J. 215 : A. I. R. 1926 L. 310 : 92 I. C. 167.

188. Gouridas (1908) 36 C. 659 : 13 C. W. N. 680 : 10 Cr. L. J. 186 : 2 I. C. 841.

189. Balaram Das (1921) 49 C. 358 : 24 Cr. L. J. 221 : A. I. R. 1922 C. 382 : 71 I. C. 685 [referring to Samiruddin (1831) 8 C. 211 : 10 C. L. R. 11 and Gouridas (1908) 36 C. 659 : 13 C. W. N. 680 : 10 Cr. L. J. 186 : 2 I. C. 841 and discussing Daulat Kunjra (1902) 6 C. W. N. 921].

190. Panchu Das (1907) 34 C. 698 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

191. (1908) 36 C. 659 : 13 C. W. N. 680 : 10 Cr. L. J. 186 : 2 I. C. 841.

192. (1921) 49 C. 358 : 24 Cr. L. J. 221 : A. I. R. 1922 C. 382 : 71 I. C. 685.

193. Sarat Chandra (1924) 52 C. 446 : 26 Cr. L. J. 1244 : A. I. R. 1925 C. 821 : 88 I. C. 800.

194. Sarat Chandra (1924) 52 C. 446 : 26 Cr. L. J. 1244 : A. I. R. 1925 C. 821 : 88 I. C. 800.

was well pointed out by the Counsel for the accused who argued the case. The following is an extract from his arguments :—

“The record of Nobin’s dying declaration was wrongly admitted in evidence. The relevant fact admissible under S. 32(1) of the Evidence Act is the “statement” of the deceased, which is the verbal statement, and not the record made by a Magistrate or Police-officer : *King Emperor v. Mathura Thakur* (1901) 6 C. W. N. 72, 81. The document is the act of the Recording-officer, and not the “statement” of the deceased, and, being made in the absence of the accused, is not admissible as substantive evidence except under some express provision of the law, e. g., S. 512 of the Criminal Procedure Code, though no doubt it may be used to contradict the Recording-officer. A dying declaration may, like any other oral statement, be proved by the Recording-officer or anyone else who heard it made, relying on his own recollection independently of the record. If he does not recollect the statement, the record can be used to refresh his memory under S. 159 of the Evidence Act, and subject to its terms, and the facts mentioned in the record, can also be proved under S. 160. But the evidentiary matter in such cases is the oral deposition of the witness and not the record. Refers to *Empress v. Sumiruddin* (1881) I. L. R. 8 Cal. 211, *King Emperor v. Mathura Thakur* (1901) 6 C. W. N. 72, *King Emperor v. Daulat Kunjra* (1902) 6 C. W. N. 921, *Queen Empress v. Sagal Samba Sajao* (1893) I. L. R. 21 Cal. 642, 653, *Panchu Das v. Emperor* (1907) I. L. R. 34 Cal. 698, 701. The same view was taken by the Madras Court in *In re Singa* (1186) 2 Weir 339., and *In re Subbu Tevan* (1884) 2 Weir 750, 752, 753 and by the Allahabad and Patna Courts in *Amjud Khan v. King Emperor* (1907) 4 A. L. J. Notes 209, and *Lachmi Lal v. King Emperor* (1922) Pat. 159. The case of *Gouridas Namasudra v. Emperor* (1908) I. L. R. 36 Cal. 659 does not conflict with the Calcutta decisions. The Judges, at page 662, held the statement contained in the written petition of complaint only to be admissible, meaning the oral statement, as the next sentence shows. This construction is supported by the fact that they followed *Empress v. Sumiruddin* (1881) I. L. R. 8 Cal. 211 and *King Emperor v. Mathura Thakur* (1901) 6 C. W. N. 72, both of which cases held the record to be inadmissible. If they meant that the record itself was admissible, the passage would be inconsistent with their adoption of the view in the two cases cited by them. They drew a distinction between the “statement” and the record, just as they did a week later, in *Fanindra Nath Banerjee v. Emperor* (1908) I. L. R. 36 Cal. 281, which, though not in point, helps us to understand the distinction taken in *Gouridas Namasudra v. Emperor* (1908) I. L. R. 36 Cal. 659. The report in the last-mentioned decision does not state whether the mohurrir was asked to refresh his memory : he was the writer and could have done so, and there was no necessity of making the record itself admissible. No doubt the Judges say that “he swears that the deceased made a statement in his presence, and that it was correctly recorded ;” but every witness proving either the oral declaration, by refreshing his memory, or the record itself, would have to prove the accuracy of the latter as a preliminary condition. The case of *Emperor v. Balaram Das* (1921) I. L. R. 49 Cal. 358 relies, at page 363, on *Gouridas Namasudra v. Emperor* (1908) I. L. R. 36 Cal. 659 ; but with the utmost respect, the Court mis-read “statement” on page 662, as meaning the written complaint. The Recording-officer in *Emperor v. Balaram Das* (1921) I. L. R. 49 Cal. 358 was dead, and the

Assistant Surgeon who proved the record could not refresh his memory under Section 159 of the Evidence Act, and the case is, therefore, distinguishable. Here the Sub-Inspector could have proved the oral statement made to him after refreshing his memory. The Sub-Registrar was unable to recollect the exact declaration. The admission of this document was a grave misdirection, vitiating the trial."

The question whether a dying declaration is admissible or not is exclusively for the Judge.¹⁹⁵ But it is a matter entirely within the province of the Jury as to what weight they should attach to a dying declaration.¹⁹⁶ Where the foundation of the prosecution case is the dying declaration of the deceased, some caution should be given to the Jury in the charge as regards the weight and efficacy to be given to the dying declaration and the attention of the Jury should be drawn to the question, how far the other facts and surrounding circumstances proved in evidence might be said to support the truth or otherwise of that declaration. Where no such caution was given, the verdict of the Jury and the sentence should be set aside.¹⁹⁷

A woman mortally wounded and believed to be at the point of death made a statement to a Magistrate naming a person as her assailant. She recovered, and when examined as a witness for the prosecution in the trial of that person said that she did not recognise the person who had attacked her. The statement previously made was admitted under S. 11 of the Evidence Act. *Held*, that the statement was not admissible under that Section, as the mere fact that she made the statement has no bearing on the main fact in issue, and that it is a serious misdirection to place such a statement before the Jury.¹⁹⁸

The statement, in order to amount to a dying declaration, must relate to the cause of death of the declarant; but may be remotely connected therewith, as in the following case.¹⁹⁹ M was assaulted on the head with a stick in the course of the commission of a robbery in her house. After she had given her first information report, she was taken to a hospital where the injuries on her head were treated. They were not of a serious nature and she was discharged from the hospital after two days. Owing to the unskilful attention she received at home the wounds on the head became septic and she subsequently died. Her death was due to her own ignorance and the unskilful treatment which she received in her village, and the injuries on her head were only the remote cause of death. M made statements in her first information report as well as before other persons immediately after the robbery that the accused was the person who struck her and committed the robbery. *Held*, that in a trial for robbery, in which the deceased received the wound which remotely caused her death, the aforesaid statements

195. Hucks (1816) 1 Stark N. P. 521, per Lord Ellenborough.

196. Premananda (1925) 52 C. 987; 29 C. W. N. 738; 42 C. L. J. 247; 26 Cr. L. J. 1256; A. I. R. 1925 C. 876; 88 I. C. 1000. See the judgment of Henderson J. in Naimuddin (1936) 40 C. W. N. 1377, in which the observations in the aforesaid case have been explained.

197. Sashi Kanta (1930) 34 C. W. N. 792; 32 Cr. L. J. 324; A. I. R. 1930. C. 754; 129 I. C. 364.

198. Abdul Sheikh (1919) 23 C. W. N. 933; 21 Cr. L. J. 183; 54 I. C. 887.

199. Nga Ba Min (1935) 37 Cr. L. J. 205; A. I. R. 1935 R. 418; 159 I. C. 1032.

regarding the circumstances of the robbery are relevant under S. 32 (1) Evidence Act. In this case it was observed,—“No doubt, there is no reason why M should have died, but it is equally plain that she could not have died at all if she had not been struck by the robbers during the course of the robbery. Consequently although no question of culpable homicide arises, nevertheless it must be held that the robbery was the transaction which resulted in her death, and that, although remotely, her death was caused by the wounds received at the robbery, the trial for robbery was a case in which the cause of her death came into question. Her statements regarding the circumstances of the robbery are relevant facts under S. 32 (1)”²⁰⁰

S. 45, Evidence Act.

Opinions of third persons are relevant only under circumstances detailed in Ss. 45 *et seq* of the Evidence Act, and the Judge must be careful to see that irrelevant opinion evidence is not admitted in a criminal trial. When a Judge was examined on his opinion upon a chief issue which had to be tried, the facts having occurred in his Court where the prisoner was a clerk, Jardine, J. said :—“It is probable that the Jury were much influenced by Mr. Bedarkar’s opinion on the chief issue they had to try. The facts occurred when Mr. Bedarkar was a Judge and the prisoner was a clerk in his Court. Juries usually give weight to the opinion of Judges. They know that Judges are used to deal with conflicting evidence, to question, to seek, to weigh it impartially : to test it by the presumptions based on general experience which are now settled rules of law. I remember a reported case in England where the learned Judge says, ‘If two Judges came and swore to the fact I would believe it’—as if that would be equal to a confirmatory oath in which it will be impossible to lie. So also Poet Browning who is fond of these legal questions, makes “Sludge and Medium” or spirit-wrappers explain that his imposture gained the common belief as soon as it was made to appear that a Judge believed in it. The Jury must have known that the issue in this case, whether the prisoner’s conduct showed fraud or negligence, is one with which Judges are dealing so constantly as to acquire great experience. As the Sessions Judge drew their attention to Mr. Bedarkar’s evidence in general terms, the Jury probably were influenced by his opinions and suspicions that frauds has been committed in which the prisoner took part, the very issue on which they had to pronounce a verdict as Judges of the facts but on the evidence before them, not on the opinions of other persons.”²⁰¹ Opinions of experts in science, art or handwriting have often to be admitted in criminal trials because inexperienced persons are unlikely to prove capable of forming a correct judgment upon the subject-matter of the inquiry without such assistance.²⁰²

The subject of medical evidence has been dealt with in Chapter II of this Part *ante*, under S. 509 Cr. P. C.

Expert evidence is also admissible to compare finger-impressions as well as handwriting.

200. *Ibid*.

201. Ramchandra Govind Harshe (1895) 19 B. 749.

202. See Taylor on Evidence, Paras, 1275, 1276, 1278, 1419 and 1421.

In case of comparison of handwriting it is necessary that the writing with which the comparison is made should be admitted or proved beyond doubt to be that of the person alleged, and that the comparison should be made in open Court in the presence of such person ; opinions of experts on handwriting are useful in so far as the appearances on which they rely are disclosed and can thus be supported or criticized, whereas an opinion formed by the Judge in the privacy of his own room is subject to no such check.²⁰³ If the cross-examining Counsel, after putting a paper into the hands of a witness, merely asks him some questions as to its general nature or identity, his adversary will have no right to see the document, but if the paper be used for the purpose of refreshing the memory of the witness, or if any question be put respecting its contents or as to the handwriting in which it is written, a sight of it may then be demanded by the opposite Counsel.²⁰⁴

The evidence of experts is to be received with considerable caution, not because they have been found by experience to wilfully misrepresent what they think but because their judgments become to a certain extent warped from regarding the subject in one point of view, so that, though most conscientiously disposed, they are not un-often incapable of expressing a correct opinion. They come with such a bias in their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence.²⁰⁵

There are five methods of proving handwriting :—(1) To call the writer himself. It is not however absolutely necessary to call the writer as the testimony of any one who knew him write is, equally with his, primary evidence of the fact ; (2) so any person who actually saw the paper or signature written may be called to prove it. (3) A witness may be called who has obtained a knowledge of and acquaintance with the person's handwriting in question by seeing that person write on other occasions. (4) The handwriting may be proved by the evidence of a witness who has acquired a knowledge thereof by having seen in the ordinary course of business documents proved, or which may be reasonably presumed, to have been written by the person whose handwriting forms the subject of the inquiry. And (5), the handwriting may be proved by comparison of two or more writings. In addition to the five methods, there is another, viz, that the handwriting may proved by circumstantial evidence under S. 67 of the Evidence Act which prescribes no particular kind of proof.²⁰⁶

On the evidence of a finger-print expert, Adamson, C. J. in charging the Jury said :—“It is difficult for the unpractised eye to follow the expert in all details, but it must be remembered that the eye of a practised expert may be able to note differences that do not present themselves to the unpractised eye.”²⁰⁷ The question as to the identity of thumb-impressions is eminently a matter for the Jury and not for the Judge, and when much

203. Barindra (1909) 37 C. 467 : 14 C. W. N. 1114 : 11 Cr. L. J. 453 : 7 I. C. 359 ; Suresh Chandra (1912) 39 C. 606 : 16 C. W. N. 812 : 13 Cr. L. J. 289 : 14 I. C. 753.
204. Jarat Kumari v. Bissessur (1911) 39 C. 245, per Woodroffe, J.

205. Per Lord Campbell in Tracy Peerage Case 10. Cl. & F. 191.
206. Barindra (1909) 37 C. 467 : 14 C. W. N. 1114 : 11 Cr. L. J. 453 : 7 I. C. 359.
207. Maung (1906) 3 L. B. R. 133 : 4 Cr. L. J. 98.

depends on the evidence of the expert the Judge should draw the attention of the Jury to the fact that the evidence of an expert should be approached with considerable care and caution.²⁰⁸

S. 54, Evidence Act.

Before the Evidence Act of 1872, instructions were issued by the Calcutta High Court that previous convictions should neither be the subject of a charge nor should they be mentioned in the address to the Jury, the former course being irregular and the latter calculated to bias the minds of the Jury against the accused ; but that they should, after conviction, be considered in determining the measure of punishment to be awarded,²⁰⁹

Section 54 of the Evidence Act embodies the old rule that evidence of bad character cannot be given against the accused in the first instance, but if the accused in the first instance gives evidence of good character then the prosecution can, to rebut that evidence, give evidence of general bad character. Previous conviction is evidence of bad character : S. 54, as it originally stood, allowed evidence of previous conviction as relevant in all cases ; consequently the Full Bench decision in *Q. E. v. Kartic Chunder Das* ²¹⁰ reluctantly held that evidence of previous convictions must be held admissible so long as the Section remained unaltered. It was in consequence of this decision that the Section was amended by Act III of 1891. Explanation to Sec. 14 of the Evidence Act was also substituted by Act III of 1891. The present Section is in accordance with the English rule. Even under the Section as it stood prior to its amendment, it was held in a case that the evidence was inadmissible. In that case, in charging the jury upon the trial of a prisoner on a charge under S. 411 I. P. C., the Sessions Judge directed the Jury to consider the proof of previous conviction of the accused. *Held*, that this amounted to a misdirection ; for though S. 54 of the Evidence Act declares that "the fact that the accused person has been previously convicted of an offence is relevant," "the same Section also declares that the fact that a person is of bad character is irrelevant" and that the evidence was irrelevant and inadmissible. It was said : "The evidence of the prisoner's previous convictions has been treated by the Sessions Judge as evidence of his character which he has told the Jury to consider in determining the value of his claim to the property found in his possession. In this respect the Sessions Judge has clearly misdirected the Jury, because the evidence was irrelevant and inadmissible * * Except under very special circumstances, none of which arises here, the proper object of using previous convictions is to determine the amount of the punishment to be awarded, should the prisoner be convicted of the offence charged." ²¹¹ This evidence the prosecution is now allowed to give in some cases in order

208. Panchu Mondal (1905) 1 C. L. J. 385 : 2 Cr. L. J. 311.

209. Bhagoman Sheikh (1866) Cr. Letter No. 593, dated 18th July 1866 (6 Wr. Cr. Letter 2).
See also Phoolchand (1867) 8 W. R. 11.

210. (1887) 14 C. 421 (F. B.).

211. Roshun Doosadh (1880) 5 C. 768 : 6 C. L. R. 219.

to get the Court to pass enhanced sentence. A separate charge has to be added for the purpose. But S. 310 Cr. P. C., provides that such separate charge shall not be read out in the Court of Session and the accused shall not be asked to plead thereto nor shall the same be referred to by the prosecution or any evidence adduced thereon, unless the accused has been convicted of the subsequent offence or the Jury have delivered their verdict or the opinions of the assessors have been recorded on the charge of the subsequent offence.

In the case of a specific offence, the Jury should not have topics of prejudice connected with the immorality of the accused placed before them.²¹² In a case tried by a Jury it is absolutely necessary to keep out the evidence of prisoner's previous conviction and bad character of the prisoner and his relations, because such evidence is inadmissible and it is wholly impossible to estimate the extent to which the Jury may be influenced by it.²¹³ Where evidence of bad character or complicity in other crimes has been let in, it must be assumed that the accused has been prejudiced.²¹⁴

But if prisoners in the course of the trial tell the Jury of their previous convictions, it cannot be helped.²¹⁵ If the prisoner in his statement talks about his own convictions, it cannot be said that the Jury may not take them into consideration.²¹⁶ If evidence of previous conviction is accidentally given at the trial, the Jury must be emphatically directed to disregard it.²¹⁷ If owing to the course of the defence, evidence is elicited to show that the accused has been previously convicted, a conviction will not necessarily be quashed.²¹⁸

Where evidence of bad character has been admitted contrary to the provisions of S. 54 of the Evidence Act, the Judge should warn the Jury that they should exclude this part of the evidence from their minds.²¹⁹ Prisoner's previous character for forgery was let in and the Sessions Judge in effect told the Jury that they would not be right if they allowed their judgment to be uninfluenced by a consideration thereof: *Held*, that this was improper.²²⁰ Where, however, the Sessions Judge, in contravention of S. 310 (a) of Act X of 1882 at one and the same examination of the prisoner after the evidence of the prosecution had been taken, enquired from him what he had to say on the charge of theft and also on the charge of having been four times convicted previously; *held*, that it was an irregularity, but the theft had been so clearly proved that the Jury could not have been influenced by it and as no failure of justice was caused the High Court declined to interfere.²²¹

In trials before a Jury or assessors the record should invariably show that reference to previous conviction was not made until the accused had been convicted of the subsequent offence.²²² The fact that a prosecution witness had brought a case under S. 107 Cr. P. C.,

212. Bloom (1910) 4 Cr. A. R. 310.

213. Phoolchand (1867) 8 W. R. 11.

214. Sheikh Abdul (1924) 26 Cr. L. J. 606; A. I. R. 1925 C. 887; 85 I. C. 830.

215. Joyce and Brown (1908) 1 Cr. A. R. 82.

216. Horsfall and Jones (1908) 1 Cr. A. R. 37.

217. Warner (1908) 1 Cr. A. R. 237.

218. King (1927) 20 Cr. A. R. 158.

219. Kailash (1928) 48 C. L. J. 481; 30 Cr. L. J. 57; 113 I. C. 73.

220. Bykunt (868) 10 W. R. 17. *See also* Kulum Sheikh (1868) 10 W. R. 39.

221. Bepin (1883) 13 C. L. R. 110.

222. Kristo Behari (1883) 12 C. L. R. 555.

against the accused and that the accused had in consequence been bound down is admissible if introduced not for proving the accused's bad character, but as a part of the *res gestae*, the events which transpired before and which eventually led up to the occurrence giving rise to the offence.²²³ In a trial for an offence under S. 396 I. P. C., the fact that the accused had been previously bound down under S. 110 Cr. P. C., and had been unable to furnish security was held inadmissible.²²⁴ The question of proof of previous conviction is one of fact which ought to go before and must be determined by the Jury.²²⁵

S. 114 Illus. (a), Evidence Act.

As regards the principles of law contained in S. 114 illus. (a) of the Evidence Act, see Notes under Ss. 379, 395 and 411 I. P. C., in Part III, Chapter I, *ante*. Some further cases on the point are here given.

The most important circumstances to be considered in dealing with the presumption arising from the possession of stolen property is the length of time that has elapsed between the loss and the recovery of the property. No definite rule can be laid down as to the precise time which is too great to make it necessary for an accused person to account for his possession. In one case it was observed that it may safely be said that after the lapse of 4 years and 8 months an accused person ought not to be called upon for his defence in respect of the actual house-breaking and theft in the committing of which the property was transferred. In that case, in charging the Jury, the Judge's direction was,—'Notwithstanding that it is nearly 5 years since the crime occurred, you will decide whether you are satisfied with the prisoner's explanation for his possession of the stolen property: *Held*, that the direction to the Jury was so defective and misleading as to amount to a misdirection, and that the verdict must be set aside and the accused acquitted (there being no other evidence except the possession of stolen property); they should have been told to consider whether after 5 years it was reasonable to require the prisoner to prove how he came by the property or whether his explanation, not being in itself improbable, ought not to be accepted.'²²⁶ Though illustration (a) to S. 114, Evidence Act, refers to cases of theft, the provision in question is no more than an illustration, and the presumption is not confined to cases of theft but extends to all charges, including even murder. Consequently, where a person is found to be in possession of part of property stolen in a dacoity soon after the dacoity, it may be presumed that he was one of the dacoits or that he received the property knowing it to have been stolen at the dacoity.²²⁷ Where two offences of robbery and murder constituted parts of the same transaction, it was held that recent and unexplained possession of stolen property which would

223. Samaruddin (1912) 40 C. 367 : 13 Cr. L. J. 821 : 17 I. C. 565.

224. Asimuddin (1920) 32 C. L. J. 89 : 22 Cr. L. J. 60 : 59 I. C. 204.

225. Esan Chunder (1874) 21 W. R. 40.

226. Puthenvittil (1884) 2 Weir 489.

227. Ramsarup Singh (1929) 9 P. 606 : 32 Cr. L. J. 72 : A. I. R. 1930 P. 513 : 128 I. C. 121. See also Chintamani (1930) 31 Cr. L. J. 1229 : A. I. R. 1930 C. 397 : 127 I. C. 557 ; Chiareddi (1911) 21 M. L. J. 1071 : 12 Cr. L. J. 564 : 12 I. C. 652.

be presumptive evidence against the prisoners on the charge of robbery was similarly evidence against them on the charge of murder.²²⁸ In making presumptions of fact or in drawing inferences of fact from evidence, the Judge or a Jury must always have regard to all the known facts of the case ; they must do so because they are required to decide on all questions of fact as reasonable men ; to attempt to isolate the particular fact or group of facts from surrounding circumstances and to discuss the legal inference may be useful mental exercise, but it is wholly out of place in a judicial decision. Where a person arrested for murder admitted to the Police during investigation that he along with his co-accused committed the murder and buried the ornaments missing from the person of the murdered girl and produced them from a place very near to where the girl was murdered, but neither then nor at any other time did he give any explanation of his connection with the ornaments : *Held*, that the Court was entitled to draw the reasonable inference that the accused had taken part in the murder.²²⁹

Accused was charged with dacoity and receiving stolen property. The Judge in his charge to the Jury directed them that the finding of the stolen shirt with the accused two months after the dacoity was "so short" a time as to justify them in convicting the accused of the dacoity itself : *Held*, that there was a misdirection. Whether the possession of the stolen property was recent enough to warrant a conviction for the substantive offence was a matter entirely for the Jury, and should not have been put to them in the positive way which the Judge adopted.²³⁰

A direction to the Jury that they should convict the prisoner if they believed that he had shown the stolen property to the Police is open to exception ; the mere fact of knowing where the stolen property is, is not equivalent to possession.²³¹

In a trial for dacoity and receiving stolen property, the charge to the Jury did not leave it to them to decide whether the prisoners were guilty of dacoity or guilty of receiving stolen property and did not contain any direction as to whether they were satisfied that the prisoners knew that the property was stolen in a dacoity, nor a reference to the lapse of time between the dacoity and finding of the property : *Held*, that there was misdirection.²³²

Where the confessions of the accused led to the discovery of stolen property obtained by dacoity, the Judge, in considering whether the accused took part in the dacoity, told the Jury that the only evidence against the accused is to be found in their confessions. *Held*, that this was a great mistake ; those confessions were only one link in the chain of evidence ; the finding of the property, which must have been taken by the persons who committed the dacoity, in the possession of the accused, or in places where such property was concealed by them immediately after the commission of the crime, is evidence of the strongest descrip-

228. Sami (1890) 13 M. 426 : 1 Weir 290.

229. In re Kallam Narayana (1932) 56 M. 231 : 34 Cr. L. J. 481 : A. I. R. 1933 M. 233 : 143 I. C. 46 [referring to Sami (1890) 13 M. 426 : 1 Weir 290 ; Chiareddi (1911) 21 M. L. J. 1071 : 12 Cr. L. J. 564 : 12 I. C. 652 ; and

Sheikh Neamatulla (1913) 17 C.W.N. 1077 : Cr. L. J. 556 : 21 I. C. 556].

230. Guzzala Hanuman (1902) 26 M. 467 : 2 Weir 517.

231. Muppidi (1895) 2 Weir 493.

232. Mammadi (1900) 2 Weir 515.

tion that the persons in possession of such property, or who were found concealing it, either themselves got possession of it by stealing it at the time of the dacoity, or got it from persons who were amongst the dacoits. Now, if there is no evidence, and no reason to suppose that the prisoners are dealers in stolen property; if, as is the case, they are shown to have been associated and in company with others, on whom other portions of the stolen property were found, immediately before the time when the dacoity was committed, the evidence leads to the inference not that they were dealers who had dishonestly bought stolen property from dacoits, but that they themselves must have been amongst the persons engaged in the dacoity and had acquired the property by such dacoity.²³³

In a charge for an offence under S. 457 and S. 438 I. P. C., it is a misdirection if the Judge does not put to the Jury the alternative presumption allowed by S. 114 of the Evidence Act.²³⁴ It is a misdirection for the Judge to ask the Jury to make a positive presumption of guilt against the accused from their possession of stolen property after the theft. Such a presumption *may* be made, but it is a matter for the Jury if they *will* make it or not.²³⁵ It is a serious misdirection for a Judge to fail to point out to the Jury that the recent possession of the murdered man's jewels is a fact from which a presumption may be drawn that the accused is not merely the thief or the receiver of the stolen property but may also be the murderer.²³⁶

S. 114 ill. (b) and S. 133, Evidence Act.

Before we proceed to deal with the point as to how Judges should lay down the law on the subject of accomplice-evidence it is necessary first to know who is an "accomplice".

Who is an accomplice.—An accomplice is one who is a guilty associate in crime, or has such a relation to the criminal act that he could be jointly indicted with the prisoner.²³⁷ *An accessory after the fact*, who could have been charged with concealment of the dead body under S. 201 I. P. C., is not an accomplice.²³⁸ Bhashhyam Ayyangar, J. said in the above case: "In regard to the testimony of accomplices or *participes criminis*, there is no doubt the maxim that an accomplice is unworthy of credit unless he is corroborated in material particulars, and this rests not on any rule of law but only on a rule of practice which has become so hallowed as to be deserving of respect. But there is no authority whatever in English law which warrants the extension of this maxim to persons who are not accomplices,

233. Shahabut Sheikh (1870) 13 W. R. 42, 43.

234. M. Bodivadu (1934) 1934 M. W. N. 375.

235. Arumuga (1933) 1933 M. W. N. 320; Satya (1924) 52 C. 223; 26 Cr. L. J. 1155; A. I. R. 1925 C. 666; 88 I. C. 515; Guzzala Hanuman (1902) 26 M. 467; 2 Weir 517.

236. Sheikh Neamatulla (1913) 17 C. W. N. 1077; 14 Cr. L. J. 556; 21 I. C. 156.

237. Ramaswami (1903) 27 M. 271, 277; 14 M. L. J. 226; 2 Weir 803; 1 Cr. L. J. 641; Daodhar (1900) 27 C. 144, 152.

238. Ramaswami (1903) 27 M. 271; 14 M. L. J. 226; 2 Weir 803; 1 Cr. L. J. 641, *per* Subrahmanya Ayyar, C. J. and Bhashyam Ayyangar, J. dissenting from the Calcutta Case-Alimuddin (1895) 23 C. 361; *Contra per* Boddam, J.

as in the Calcutta cases (24 W. R. 55, 21 C. 323, 23 C. 361 noted below) ; and I do not think it will be in furtherance of justice to regard another class of witnesses as *quasi accomplices* and to extend the maxim to them." In *Q. v. Chutterdharee*,²³⁹ the High Court treated an accessory after the fact, who remained silent for about four years, on the same footing as an accomplice and refused to accept his testimony unconditionally as that of an ordinary witness. Persons who took no part in the crime and had no knowledge of it till after its commission cannot be described as accomplices.²⁴⁰ The word "accomplice" is not defined in the Indian Evidence Act or any other Indian Statute ; an indication of its meaning may be found in S. 337 Cr. P. C ; there the word is used in the marginal note, and the Section itself refers to any person supposed to have been directly or indirectly concerned in the offence under inquiry. A witness alleged to have taken part jointly with the accused in an offence different from that for which the accused is being tried is not an accomplice.²⁴¹ In the above case the facts appeared to be that G, the servant of a firm of merchants, loaded a consignment of goods on behalf of the firm at the appellant's (Station Master's) station, but less weight than the actual weight was entered in the books of the Railway Company, and the freight credited to the Company was based on the false weight and a sum of Rs. 2/- more was alleged to have been paid by G and appropriated by the accused. On the above facts, Newbould, J. held that G was not an accomplice and it was not necessary for the Judge to warn the Jury that it was unsafe to convict on his evidence unless it was corroborated in material particulars ; while Shamsul Huda, J. held that to constitute an accomplice there need only be the intention of assisting in the commission of a crime but the accomplice need not know exactly what crime was being committed ;²⁴² and that even if G was not an accomplice in the technical sense of the term, his evidence was no better than that of an accomplice and should have been dealt with on that footing.²⁴³ The majority, Chaudhuri and Shamsul Huda, JJ. held : That the facts alleged disclosed an offence either of receiving a bribe or that of criminal breach of trust and the Sessions Judge misdirected the Jury as to the evidence of G, and the misdirection was such as vitiated the trial.

Where the facts are such as would form sufficient grounds for putting a witness on his trial upon a charge of abetting the murder for which the prisoner is being tried, the witness must be considered and treated as an accomplice.²⁴⁴

The word "accomplice" is made, at times, to bear, improperly, a larger meaning than is allowable, according to its accepted interpretation of law. As pointed out by Mr. Justice Monk in *R. v. Mullins*, 3 Cox. C. C. 526 at page 531,—“An accomplice confesses himself a criminal”. No man ought to be treated as accomplice on mere suspicion unless he confesses

239. (1866) 5 W. R. 59.

240. *Jehana* (1923) 24 Cr. L. J. 618 : A. I. R. 1923 L. 345 : 73 I. C. 506.

241. *Per* Newbould, J. in *Suryya Kanta* (1919) 24 C. W. N. 119 : 31 C. L. J. 20 : 21 Cr. L. J. 802 : 58 I. C. 674 [referring to *Ramaswami*

(1903) 27 M. 271 : 14 M. L. J. 226 : 2 Weir 803 : 1 Cr. L. J. 641].

242. Referring to *Cratchley* (1913) 9 Cr. A. R. 232.

243. Referring to *Chando* (1875) 24 W. R. 55, *Alimuddin* (1895) 23 C. 361, and *Ishan Chandra* (1893) 21 C. 328].

244. *O' Hara* (1890) 17 C. 642 (F. B.).

that he had a conscious hand in the crime or he makes admissions of facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not an accomplice ; and his testimony must be judged on principles applicable to ordinary witnesses.²⁴⁵

A person cognizant of a crime about to be committed, who accompanied the actual murderer to the place of the crime, is a party to the conspiracy to murder, and an accomplice within S. 114 (b) of the Evidence Act.²⁴⁶

Where the witness is the paramour of the accused, who accompanied him to the scene of murder and assisted him and after the deed shut herself up without giving any information until the next day, such a witness is to all intents and purposes an accomplice.²⁴⁷

Where a woman knew all about the proposal to murder her husband and she was a consenting party to the commission of the crime, she is certainly an accomplice, regard being had to the provisions of S. 44 Cr. P. C., and the definition of abetment under S. 107 of the Penal Code.²⁴⁸

An accomplice includes one who poses as an accomplice, and his evidence requires corroboration.²⁴⁹

A married woman who consents to her husband committing unnatural offence with her is an accomplice and as such her evidence requires corroboration. And the same would be the case if the party with whom the offence was committed was a male and consented.²⁵⁰ In cases arising out of sexual matters, the Judge must emphasize sufficiently the danger of convicting a man upon the uncorroborated testimony of a girl ; he must make the Jury understand that only in exceptional cases will they be justified in accepting her uncorroborated testimony.²⁵¹ In a case of rape it is the duty of the Judge to warn the Jury not to accept the evidence of the girl raped unless they find that it is corroborated in some material particulars implicating the accused. He should also tell them that if inspite of his warning they come to the conclusion that they believe the girl and think the accused guilty then they have the right to convict him on her un-corroborated evidence.²⁵²

A witness, who had been previously convicted and sentenced in connection with the same offence, is none the less an accomplice-witness.²⁵³ According to Glover, J, in the same case, he is an ordinary witness not requiring corroboration. According to Edge C. J., and

245. Burn (1909) 11 Bom. L. R. 1153 : 10 Cr. L. J. 530 : 4 I. C. 268.

246. Madan Guru (1918) 24 Cr. L. J. 723, 730 : 73 I. C. 963 (P).

247. Bahawala (1925) 6 L. 183, 187, 188 : 26 Cr. L. J. 1938 : A. I. R. 1925 L. 432 : 88 I. C. 854.

248. Shahrah (1919) 20 P. R. 1919 : 20 Cr. L. J. 191 : 49 I. C. 607.

249. Golam Asphia (1932) 33 Cr. L. J. 477 : A. I. R. 1932 C. 295 : 137 I. C. 497.

250. Jellyman (1838) 8 C. and P. 604.

251. Nur Ahmed (1933) 62 C. 527 : 38 C. W. N. 108 : 36 Cr. L. J. 797 : A. I. R. 1934 C. 7 : 155 I. C. 584.

252. Surendra (1933) 38 C. W. N. 52 : 35 Cr. L. J. 508 : A. I. R. 1933 C. 833 : 147 I. C. 999.

253. Ramsodoy (1873) 20 W. R. 19 [*Contra, per* Glover J. in that case ; and Edge, C. J. and Straight, J. in Gobardhan (1887) 9 A. 528 : 7 A. W. N. 150] ; Priya Nath (1912) 15 C. L. J. 692 : 13 Cr. L. J. 255 : 14 I. C. 607.

Straight, J. (*Contra*, Brodhurst, J.) such a witness cannot have any motive in telling falsehood like an accomplice who is being tried or is awaiting trial and so is more likely to tell an exculpatory falsehood. Even if corroboration is required a slight corroboration would be sufficient.²⁵⁴

Witnesses, who, in order to avoid pecuniary injury or personal molestation, offered or gave bribes to a public servant, were held abettors of the offence of taking an illegal gratification and their evidence was treated as that of accomplices.²⁵⁵ A person who gives bribes is an accomplice of the person who received them.²⁵⁶ The giver of a bribe as well as everybody who knowingly assists in raising or conveying the money to the bribe-taker must technically be regarded as accomplices of the latter, though the discredit attaching to their evidence may be very slight.²⁵⁷ Mere presence of a person on the occasion of the giving of a bribe, and his omission to promptly inform the authorities, do not constitute him an accomplice, unless it can be shown that he somehow co-operated in the payment of the bribe, or was instrumental in the negotiations for the payment.²⁵⁸ Where certain persons accompanied another, who was entrusted with and carried the money intended to be given as a bribe to the Head-constable, with knowledge that it was to be so paid and in order to witness and assist in such payment, it was *held*, that they were accomplices.²⁵⁹ Where P, a money-lender who lent the money demanded by the accused, a Sub-Inspector of Police, from one J (who was arrested and was threatened by the accused that unless the money was paid he would not be released) to the said J for this purpose; *held*, that P paying such money under such circumstances could not be regarded as an accomplice of the Sub-Inspector in such misconduct.²⁶⁰ There is distinction between the two cases, where the officer is tempted by bribes and where money is extorted by threat; the first is a case of *voluntary* accomplices and the second of *involuntary* accomplices; the evidence of the latter class is not tainted as much as it would otherwise be.²⁶¹ In a case under S. 161 I. P. C., persons who were either instrumental in negotiating the bribe or in arranging for its payment are in the position of accomplices, and according to well-settled principles it is highly unsafe to base a conviction on their testimony without independent corroboration.²⁶²

254. Gobardhan (1887) 9 A. 528, 555, 583 : 7 A. W. N. 156. *See also* Nilakanta (1912) 35 M. 247, 347 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849 ; *In re* Marudaimuthu (1892) 2 Weir 520.

255. Jogendra (1897) 2 C. W. N. 55 ; Maganlal (1889) 14 B. 115.

256. Malhar (1901) 26 B. 193 : 3 Bom. L. R. 694 ; Chagan (1890) 14 B. 331.

257. *In re* Vyasa Rao (1911) 21 M. L. J. 283 : 12 Cr. L. J. 150 : 9 I. C. 897.

258. Deodhar (1900) 27 C. 144 ; Deo Nandan (1906) 33 C. 649 : 10 C. W. N. 669 : 3 Cr. L. J. 452 ; Khadam Ali (1919) 15 P. W. R. 1919 : 20 Cr. L. J. 258 : 50 I. C. 18 ; Mangal Sain

(1933) 34 P. L. R. 836 : 35 Cr. L. J. 452 : 147 I. C. 557. *But see* Smither (1902) 26 M. 1 : 2 Weir 521.

259. Rajoni v. Asan (1895) 2 C. W. N. 672.

260. Akhoy v. Jagat (1900) 27 C. 925 : 4 C. W. N. 755. *See also* *In re* Talari (1911) 12 Cr. L. J. 170 : 9 I. C. 978 (M.)

261. *Per* Subrahmanya Ayyar C. J. in Ramaswami (1903) 27 M. 271 : 14 M. L. J. 226 : 2 Weir 803 : 1 Cr. L. J. 641. *See also* Ring (1929) 53 B. 479 : 31 Cr. L. J. 65 : A. I. R. 1929 B. 296 : 120 I. C. 340.

262. Mangal Sain (1933) 34 P. L. R. 836 : 35 Cr. L. J. 452 : 147 I. C. 557.

Witness no better than an accomplice. —

Where a witness admits that he was cognizant of the crime, as to which he testifies, and took no means to prevent or disclose it, his evidence must be considered as no better than that of an accomplice, and an accused person cannot be convicted solely upon the evidence of persons who are more or less participators in the crime of which he is accused.²⁶³

Where witnesses appeared to have taken an active part in carrying away a person after he had been grievously assaulted and was in a helpless condition and then leaving him in a field where he was subsequently found dead, their evidence was no better than that of accomplices ; at any rate, it would be very unsafe for the Court to rely upon their evidence, unless corroborated in material respects, in convicting the accused.²⁶⁴ Where a witness says that she helped the accused to dispose of the body only because he threatened to kill her if she did not, she would not be an accomplice ; but whether she was an accomplice or not, it would certainly be unsafe to rely on her evidence unless it is corroborated in some material particulars against the accused.²⁶⁵

Where an informer was, upon his own statement, cognizant of the commission of an offence and omitted to disclose it for six days, the High Court was not prepared to say that he was an accomplice, but held that his testimony was not such as to justify a conviction except where it was corroborated.²⁶⁶

As to the comment on *Chando* above and generally on the aforesaid cases, see *Ramaswami Gouenden* 27 M. 271, cited under the previous heading. With reference to the case of *Chando*, Benson, J. in *R. v. Smither*²⁶⁷ says :—"That was a dictum in regard to a particular witness, and it by no means justifies a general proposition that every witness, in all classes of cases, who acts as the witness did, must be treated as practically an accomplice." Also, "the case of *Ishan Chandra* has still less application to the present case. The remarks of the Judge in these cases must be read in reference to the particular facts then under discussion, and, when so read, they do not at all support the broad proposition laid down. When the principles or rules of law on any matter have been laid down in general terms by the Legislature, a Judge will, in most cases, be wise to refer to the exact terms of the law, and then instruct the Jury with regard to its application to the facts before them, instead of adopting as principles passages from text-books (however eminent the writer may be) which briefly refer to what is laid down (or is supposed to be laid down) in reported cases or even the passages from the judgments of the reported cases themselves, which may mislead by not being correctly understood in relation to the facts of the particular case, or possibly even by not containing an accurate exposition of the law. * * * There is nothing in the law (Ss. 133, 114 of the Evidence Act) as laid down in these Sections, to justify the broad proposition quoted by the Judge that the evidence of witnesses, who admit that they were cognizant of a crime, that they made no attempt to

263. *Chando* (1875) 24 W. R. 55.

264. *Alimuddin* (1895) 23 C. 361.

265. *Nanhu* (1935) 18 N. L. J. 327 : 37 Cr. L. J. 846 : 163 I. C. 460.

265. *Ishan Chandra* (1893) 21 C. 328.

267. *Smither* (1902) 26 M. 1, 11, 12, : 2 Weir 521.

prevent it and that they did not disclose its commission, should only be relied on to the same extent as that of accomplices. The degree of credit to be attached to the evidence of such witnesses depends on all the facts and circumstances of the case. For instance, if a busy man sees a person strike another a trifling blow on the street, and if the witness proceeds on his way without interfering or calling for the Police, and is summoned next day to give evidence as to what he saw, can it be supposed for a moment that he is to be regarded as "practically an accomplice," and that his evidence is to be treated with suspicion because, though cognizant of the assault, he made no attempt to prevent it and gave no information to the authorities. There would, in such a case, be no obligation on the witness to interfere or to give information to the Police. He might have thought the person assailed will be able to take care of himself, or he might have thought the assault unimportant compared with his own important business. On the other hand, if a Policeman should see a thief pick a lady's pocket in the street and not interfere or report the matter for months, and should then give evidence of it, without explaining his inaction, the Court will be right in treating his evidence with suspicion, not on the ground that he must necessarily have been an accomplice, but on the principle which is laid down in S. 114 of the Evidence Act, viz, that the Court might presume his evidence to be untrue because he did not act in accordance with the common course of human conduct and his public duty in relation to the facts of the particular case."

*In Q. v. Chutterdharee*²⁶⁸ Norman, J., observes: "In Gilbert on Evidence, cited in Archbold's Criminal Pleading—p. 226, accessories are placed in the same category as accomplices. But it is evident that they stand on a very different footing. Their guilt may be infinitely less, and they have not the same interest in making a charge against others to save themselves. It is not every participation in a crime which will make a party an accomplice in it so as to require his testimony to be confirmed (Best on Evidence, page 223)". There is nothing in law to justify the proposition that evidence of a witness who happens to be cognizant of a crime or who made no attempt to prevent it or who did not disclose its commission, should only be relied on to the same extent as that of an accomplice. Such persons are not accomplices and the degree of credit to be attached to the testimony of such a witness depends on all the facts and circumstances of particular cases.²⁶⁹

When a person sees a murder committed and takes no means to disclose it, his evidence must be considered as no better than that of an accomplice.²⁷⁰ Where the accused's wife was present when the murder was committed and kept silent for five long months, she was practically an accomplice with her husband in the commission of murder.²⁷¹ Witnesses who had admittedly witnessed the crime and had assisted in concealing the evidence of that crime or at least had connived at such thing being done and who did not attempt to give any information either to the Police or to any other person to enable the offenders to be brought to

268. (1866) 5 W. R. 59.

269. Hafijuddi (1934) 38 C. W. N. 777 (S. B.): 35
Cr. L. J. 1357; A. I. R. 1934 C. 678: 151
I. C. 486.

270. Nawab (1923) 25 Cr. L. J. 264; A. I. R. 1923
L. 391; 76 I. C. 824.

271. Bhaganti (1934) 11 O. W. N. 581; 35 Cr.
L. J. 1042; A. I. R. 1934 O. 362; 150 I. C. 205

justice are not in a better position than that of accomplices and it is not safe to accept their testimony unless corroborated by some independent circumstances.²⁷²

A woman witness, who was used as a decoy to bring the deceased within the clutches of those who were burning to punish him and who was present throughout the assault and was paid for her services with Rs. 4/- and a peice of cloth, cannot be put higher than an accomplice, and her evidence requires corroboration.²⁷³

Where a person was erroneously treated as an accomplice and was granted a conditional pardon, *held*, that his evidence did not require corroboration.²⁷⁴

Whether a spy is an accomplice.—

"An accomplice confesses himself a criminal and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man ; he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society ; and if he does so, if he believes that there is no other method of counteracting dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The Government are, no doubt, justified in employing spies ; and I do not see that a person so employed deserves to be blamed, if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished, in fact and in principle, from accomplices ; and although their evidence is entirely for the Jury to judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration."²⁷⁵ In *Rex v. Despard*, 28 Howell's State Trials 489, where the accused was tried for high treason, Lord Ellenborough in his summing up to the Jury said,—“But there is another class of persons which cannot properly be considered as coming within the description or as partaking of the criminal contamination of an accomplice, I mean, persons entering into communication with the conspirator, with an original purpose of discovering their secret designs and disclosing them for the benefit of the public. The existence of such original purpose on their part is best evinced by a conduct which precludes them from ever wavering in or swerving from the discharge of their duty, if they might otherwise be disposed to do so.”

It was, however, held in *Q. E. v. Javecharam*,²⁷⁶ that the action of a spy or informer in suggesting and initiating a criminal offence is itself an offence, the act not being excepted or justified by any exception in the Indian Penal Code, or by the doctrine which distinguishes the spy from the accomplice ; though the act of a detective in supplying marked money for the detection of a crime cannot be treated as that of an accomplice. This view

272. Hayatu (1929) 31 Cr. L. J. 50 ; A. I. R. 1929 L. 540 ; 120 I. C. 190.

273. Baijoo (1876) 25 W. R. 43.

274. Fattchand (1868) 5 B. H. C. R. 85.

275. *Per* Mr. Justice Maule in *Mullins* 3 Cox. C. C. 526, quoted as an authority in *Javecharam*

(1894) 19 B. 363. *See also* Bhuneshwari (1931) 8 O. W. N. 503 ; 32 Cr. L. J. 860 ; A. I. R. 1931 O. 172 ; 132 I. C. 234.

276. (1894) 19 B. 363 [referred to in *Surat Bahadur* (1924) 1 O. W. N. 362 ; 25 Cr. L. J. 1162 ; A. I. R. 1925 O. 158 ; 81 I. C. 986].

of the Bombay High Court has been dissented from in *E. v. Chatur Bhuj*,²⁷⁷ as being opposed to the ruling in *R. v. Henry Bickley* (1909) 2 Cr. A. R. 53 : 73 J. P. 239, where the woman who asked the prisoner to supply her with a noxious drug to cause her miscarriage (who was not in fact pregnant) and who in doing so acted under police instruction was clearly the first instigator and yet the Court held that that circumstance did not deprive her of the character of a spy, nor must her evidence be regarded as that of an accomplice. Doss J., observed : "But though the testimony of a spy does not stand in need of corroboration in order to be acted upon, it is entirely for the Judge of fact to decide in each particular case what weight he shall attach to this kind of evidence, the question depending upon the character of each individual witness. It may sometimes be difficult to draw the line of discrimination between an accomplice and a pretended confederate, such as a detective, spy or decoy, but we think the line may be drawn in this way : If the witness has made himself an agent for the prosecution before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice ; but he may be an accomplice, if he extends no aid to the prosecution until after the offence has been committed." In *Pulin Behari v. K. E.*²⁷⁸ Mookerjee J. also held that where a witness has made himself an agent for the prosecution before associating with the wrong-doers or before the actual perpetration of the offence, he is not an accomplice, but he may be, if he extends no aid to the prosecution until after the offence is committed. A mere detective or decoy is not therefore an accomplice, nor an original confederate who betrays before the crime was committed. Yet an accessory after the fact would be an accomplice if he had, before betrayal, rendered himself liable as such. He also held that as the crime of conspiracy is complete, the moment there is concerted intention, members of the conspiracy, who, after such agreement, have, out of fear or repentance, transformed themselves into spies and informers, do not thereby cease to be accomplices, and their evidence requires corroboration to the same extent and character as in the case of accomplices ;²⁷⁹ that overt acts may properly be looked at as evidence of the existence of a concerted intention and in many cases it is only by means of overt acts that the existence of the conspiracy can be made out ; but the criminality of the conspiracy is independent of the criminality of the overt act. In the same case Harington J. held, that the testimony of persons who have been members of a criminal conspiracy or else have joined it for the purpose of betraying its secrets must be very carefully scrutinized and much weight cannot be attached to it unless it is corroborated by other circumstances. Police-officers, who assent to an informer's entrapping an offender, do not thereby become accomplices.²⁸⁰

Meaning of the term "Approver." —

The term "approver" is given to that accomplice who has been granted a conditional pardon under the provisions of Ss. 337 and 338 Cr. P. C. Where a criminal is admitted to

277. (1910) 38 C. 96 : 15 C. W. N. 171 : 11 Cr. L. J. 560 : 81 C. 119.
 278. (1912) 16 C. W. N. 1105, 1148 : 15 C. L. J. 517, 599 : 13 Cr. L. J. 609 : 16 I. C. 257:

279. See also *Karim Bakhsh* (1927) 9 L. 550 : 29 Cr. L. J. 577 : A. I. R. 1928 L. 193 : 109 I. C. 593 [wherein Tek Chand, J. has reviewed all the important cases on the point.]
 280. *Henseur* (1911) 6 Cr. A. R. 76.

bear testimony against his accomplice, he is then said to turn "King's or Queen's Evidence." His status as a witness is the same as that of an accomplice-witness.

S. 337 Cr. P. C., however, is not the only procedure by which an accomplice's evidence may be received on a promise of immunity from prosecution. In the case of *E. v. Har Prasad Bhargava*,²⁸¹ the facts were that the Government of Central Provinces having before it the case of a Subordinate Judge, who was suspected of receiving bribes, issued a Notification to the effect that no prosecution would be instituted by Government against any person who came forward with evidence that he had paid or offered a bribe to the particular Officer whose case was under consideration. In consequence of this Notification, two persons came forward and gave evidence against the Subordinate Judge, being undoubtedly accomplices as regards the offence with which the accused was charged. It was held in that case, that a refusal to admit a witness' evidence on the record merely because witness was an accomplice and because the case was outside the purview of S. 337 Cr. P. C., is a clear error of law ; that a discretion to refrain from instituting a prosecution, in any particular case, is inherent in any authority to which the law has entrusted the power to institute a prosecution, nor can any law prevent a person or a body of persons, exercising such authority, from determining beforehand how that discretion shall be exercised upon the happening of a certain contingent event. Where the Local Government promised one of the accused persons not to prosecute him in respect of the offence for which he was arrested, to which offence S. 337 Cr. P. C. did not apply, but in respect of whom no written or verbal order of discharge was ever given : *Held*, that the said accused continued to remain as an accused person and his evidence as a witness was inadmissible.²⁸²

If a statement is accepted as that of an approver without any test as to his complicity in the crime, the statement does not amount to evidence against the accused.²⁸³

**Duty of the Judge when a question arises whether a particular witness
is an accomplice or not.—**

Where the facts raise sufficient suspicion that a person was an accomplice it is necessary for the Judge to have that question put for the Jury's consideration.²⁸⁴ It is for the Jury to consider whether a witness who has guilty knowledge of a crime is an accomplice.²⁸⁵ But the Judge ought not to put that question to the Jury coupled with a strong expression of opinion, couched in terms of the most persuasive force, that he was not one ; for the substantial effect of that would be to ask the Jury to treat that person's evidence as being of as much weight as that of a perfectly independent and unprejudiced witness ; it would be a misdirection

281. (1922) 45 A. 226 : 25 Cr. L. J. 497 : A. I. R. 1923 A. 91 : 77 I. C. 961.

282. *Mahandu* (1919) 1 L. 102 : 21 Cr. L. J. 599 : 57 I. C. 167 [relying on *Banu Singh* (1906) 33 C. 1353 : 10 C. W. N. 962 : 4 Cr. L. J. 145 and dissenting from *Sardar Khan* (1904) 21 P. R. [904 : 1 Cr. L. J. 1066.]. *But see*

Mohammad Yakub (1931) 33 Cr. L. J. 373 : A. I. R. 1932 A. 73 : 137 I. C. 73.

283. *Sant Ram* (1923) 24 Cr. L. J. 799 : A. I. R. 1924 O. 188 : 74 I. C. 543.

284. *Moss* (1926) 28 Cr. L. J. 278 : A. I. R. 1927 C. 460 : 100 I. C. 358.

285. *Cratchley* (1913) 9 Cr. A. R. 232.

in fact, though not in form.²⁸⁶ The Judge should explain to the Jury what an accomplice is and should ask them to say upon the facts whether the witness is or is not an accomplice. The Judge should further tell the Jury that if the witness was a party to the conspiracy to cheat the Railway Company, he is an accomplice and it is not safe or proper to convict upon his evidence without corroboration in material particulars. The Judge should also explain to the Jury the nature of the corroboration in material particulars. The Judge should also explain to the Jury the nature of the corroboration necessary in such cases.²⁸⁷

Three witnesses were present at the time of the payment of the bribe but took no part in the transaction, and for 2½ years they never told anybody what had happened. The Judge treated these witnesses as accomplices. The High Court held that the Judge was wrong in treating them in that way and therefore there was a misdirection to the Jury.²⁸⁸ But where the Judge told the Jury that if they considered the witness as no better than an accomplice, then corroboration should be sought, *held* that there was no misdirection.²⁸⁹ Where there was omission to say expressly that such persons are no better than accomplices, but suspicion from delay in producing their evidence, and their own explanation were pointed out, and the Jury advised to place a proper value on their testimony, it was held that there was no misdirection.²⁹⁰ The Judge ought to caution the Jury in accepting the statement of a witness whose connection with the transaction was open to suspicion; and he misdirects them if he asks them to depend on his statement,²⁹¹ or fails to point out to them the necessary corroboration.²⁹² Where the principal prosecution witness was suspected by the prosecution of complicity in the offence, arrested but not sent up, the omission to warn the Jury that he was no better than an accomplice requiring corroboration was held to be a misdirection.²⁹³

The law on the subject of reception of accomplice's evidence.—

The Indian Evidence Act I of 1872, contains the following provisions :—

1. In Chapter VII (dealing with 'Burden of proof') S. 114 enacts,—“The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Illustration (b) : the Court may presume that an accomplice is unworthy of credit, unless he is corroborated in material particulars.

But the Court shall also have regard to such facts as the following in considering whether such maxims do or do not apply to the particular case before it :—

- | | |
|---|---|
| 286. O' Hara (1890) 17 C. 642 (F. B.) | 290. Umed Sheikh (1926) 30 C. W. N. 816 : 45 C. L. J. 581 : 27 Cr. L. J. 1011 : 96 I. C. 867. |
| 287. Per Shamsul Huda, J. in <i>Suryya Kanta</i> (1919) 24 C. W. N. 119 : 31 C. L. J. 20 : 21 Cr. L. J. 802 : 58 I. C. 674. | 291. Ramgopal (1868) 10 W. R. 7, 9. |
| 288. Smither (1902) 26 M. 1 : 2 Weir 521. See <i>Fattechand</i> (1868) 5 B. H. C. R. 85. | 292. Moss (1926) 28 Cr. L. J. 278 : A. I. R. 1927 C. 460 : 100 I. C. 358. |
| 289. <i>Bhairab</i> (1898) 2 C. W. N. 702, 706, 711, | 293. <i>Satya</i> (1924) 52 C. 223 : 26 Cr. L. J. 1155 : A. I. R. 1925 C. 666 : 88 I. C. 515, |

As to illustration (b) : (1) A, a person of the highest character is tried for causing a man's death by an act of negligence in arranging certain machinery. B, a person of equally good character, who also took part in the arrangement, describes precisely what was done, and admits and explains the common carelessness of A and himself ;

(2) A crime is committed by several persons. A, B, and C, three of the criminals, are captured on the spot, and kept apart from each other. Each gives an account of the crime implicating D, and the accounts corroborate each other in such a manner as to render previous concert highly improbable."

2. In Chapter IX (dealing with 'Witnesses') S. 133 enacts :—

"An accomplice shall be a competent witness against an accused person ; and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice."

3. S. 4 provides :—

"Whenever it is provided by this Act that the Court *may presume* a fact, it may either regard such fact as proved, unless and until it is disproved or may call for proof of it."

And, S. 3 says :—

"A fact is said to be *proved* when, after considering the matters before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

When S. 118 of the Evidence Act provides that all persons shall be competent to testify (except infants, very old persons, or persons suffering from bodily or mental infirmities, whom the Court considers as unable to understand the questions put to them or give rational answers to these questions), and S. 134 provides that no particular number of witnesses shall, in any case, be required for the proof of any fact, that is to say, when the testimony of one witness may be sufficient for a conviction, a question may be asked, what then is the necessity of enacting S. 133, which says that an accomplice is a competent witness and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice ? The answer is to be found in the legislative sanction given to the maxim founded on human experience that an accomplice is unworthy of credit unless corroborated in material particulars, and which is embodied in S. 114, III (b) of the Evidence Act, quoted above. An ordinary witness deposing on oath starts with no presumption against him as to his credibility. Unless his credit is impeached by cross-examination or by other evidence, the Court may act on his statement alone and convict an accused. The accomplice, who confesses his own connection with the crime and so confesses himself to be a man of bad character, starts with an initial presumption against his credibility and the Court is ordinarily entitled to presume that he

should not be believed unless his testimony as to the guilt of the accused is corroborated by other evidence, against which there is no such initial presumption, or unless there are facts and circumstances in the case which preclude the Court from applying the maxim against him. It is in the latter case only that the accomplice witness loses his tainted character and is considered as an ordinary witness, and as under S. 134, no particular number of witnesses shall in any case be required for the proof of any fact, that Section may apply to his case and hence a conviction is legal though it proceeds on the uncorroborated testimony of an accomplice. In short, the effect of the said provision in the Evidence Act is that tainted evidence should not ordinarily be believed, unless it is corroborated,—not by similar tainted evidence but by independent evidence, or unless there are special circumstances in the case which remove the inherent taint. Instances of such special circumstances are given in S. 114. Ill (b) quoted above. If there be no such special circumstances in the case, the Judge may believe the accomplice, but this belief would not be legally sufficient for a conviction. In the words of Sir Barnes Peacock, C. J., in the Full Bench Case of *Elahee Buksh*,—²⁹⁴ “There is a wide difference between disbelieving evidence and determining that it is not legally sufficient if believed, but this distinction is not sufficiently adverted to by the Courts which are Judges of fact as well as of law.”

The enactment that “an accomplice shall be a competent witness”, in the face of the general provision as to the competency of all classes of witnesses contained in S. 118, would seem to be merely for emphasis. There is also a history behind it. Formerly, the rule was that the mere commission of a crime did not render a witness incompetent, but persons convicted of treason, felony, or certain other crimes were rendered incompetent by conviction. The incompetency created by conviction was removed in England by Act of Parliament, and was subsequently removed in India by Act XIX of 1837, by which it was enacted that no person shall, by reason of conviction for any offence whatever, be incompetent to be a witness in any stage of a cause, civil or criminal, or before any Court in the territories of the East India Company. Again S. 28 of the Indian Evidence Act, II of 1855, enacted that, except in cases of treason, the direct evidence of one witness who is entitled to full credit shall be sufficient for proof of any fact, ‘but this provision shall not affect any rule or practice of any Court that requires corroborated evidence in support of the testimony of an accomplice’.

Prior to the enactment of the Evidence Act in 1872, the principles which should govern the reception and appreciation of an approver’s or accomplice’s evidence in criminal trials were fully and authoritatively laid down by the Full Bench of the Calcutta High Court in the case of *Reg. v. Elahee Buksh*, *ante*, in the following terms :—

“A conviction founded upon the uncorroborated evidence of one or more accomplices alone is valid in law.

“The evidence of accomplices should not be left to a Jury without such directions and observations from the Judge as the circumstances of the case may require.

"Improper advice given by the Judge to the Jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the Jury upon the questions of fact, amounts to such an error in law in summing up as to justifying the High Court, on appeal or revision, in setting aside a verdict of guilty.

"The power of setting aside convictions and ordering new trials for any error or defect in the summing up, will be exercised by the High Court only when the Court is satisfied that the accused person has been prejudiced by error or defect, or that a failure of justice has been occasioned thereby."²⁹⁵

And in 4 Mad. H. C. Rep. App. vii (1868), the Madras High Court laid down for the future guidance of the Sessions Judges, that they should inform the assessors (now Jurors) :— 1st, that there is no rule of law prohibiting the conviction of an offender upon the uncorroborated evidence of an accomplice ; 2ndly, that, as a general rule of practice, it is considered unsafe to convict upon such evidence ; and 3rdly, to point out any circumstances in the particular case which, in the opinion of the Judge, afford a sufficient reason for relying upon the evidence in that case.

These principles have now become matters of legislative enactments in the Evidence Act and the Code of Criminal Procedure.

Judicial interpretations of Ss. 114 and 133 of the Evidence Act,

however, show some divergence in the opinions of the Judges. According to some, both these Sections must be read together ; according to others, S. 133 contains the substantive rule of law, while S. 114 III. (b) is only a guide and does not override S. 133 or regard accomplice evidence as always untrustworthy unless corroborated or preclude the Court from acting on the uncorroborated evidence believed to be true. Below are given some of the important decisions.

Phear, J. in *Q. v. Sadhu Mundul*,²⁹⁶ after discussing Ss. 144 and 133 of the Evidence Act, says : "On the whole, the result appears to be that the Legislature has laid it down as a maxim or rule of evidence resting on human experience that an accomplice is unworthy of credit against an accused person, i.e., so far as his testimony implicates an accused person, unless it is corroborated in material particulars in respect to that person ; that it is the duty of the Court, which in any particular case has to deal with an accomplice's testimony, to consider whether this maxim applies to exclude that testimony or not ; in other words, to consider whether the requisite corroboration is furnished by other evidence or facts proved in the case, though, at the same time, the Court may rightly, in *exceptional cases*, notwithstanding the maxim, and in the absence of this corroboration, give credit to the accomplice's testimony

295. See also Nunhoo (1868) 9 W. R. 28 ; Nawab Jan (1867) 8 W. R. 19 ; Karoo (1866) 6 W. R. 44.

296. (1874) 21 W. R. 69, 70.

against the accused, if it sees good reason for doing so upon grounds other than, so to speak, the personal corroboration.

"Now in the case of a trial by Jury, it is the function of the Jury to ascertain the facts upon the evidence before them, and for that purpose to be guided by the law which is applicable, and it is in all cases the duty of the Judge to point out to them that law. It was, therefore, in the present case, the duty of the Judge to lay before the Jury substantially, to the effect just set out, the principles relative to the reception of an accomplice's testimony, which the Legislature sanctioned by the Indian Evidence Act; and we think the Judge was wrong in telling the Jury that this case was one in which no caution or instruction from him was needed on this head. *It is, in all cases where an accomplice's testimony is admitted, incumbent on the Judge to inform the Jury of the results of the law bearing on this point, substantially as we have just endeavoured to explain it.*

In *Q. v. Ramsodoy Chuckerbutty*²⁹⁷ Glover, J. wanted to make a distinction between an accomplice who had already been tried and convicted and an accomplice who has been made an approver or is being jointly tried with the other accused. According to him an accomplice witness is one who is either being jointly tried for the same offence and makes admissions which may be taken as evidence against a co-prisoner and which make the confessing accused *pro hac vice* a sort of witness, or one who has received a conditional pardon on the understanding that he has to tell what he knows and who may be at any time relegated to the dock if he fails in his undertaking. The accomplice, who had already been tried for the offence and convicted, stands on a different category from that of an approver, whose own escape depends on the entirety of his evidence, and, it may be, on the view which the Judge takes of it; and his evidence may be taken as that of an ordinary witness and does not require corroboration. Mitter, J., differed from him and the case was referred to Pontifex, J., who held, agreeing with Mitter, J., that an accomplice who has already been tried and convicted is none the less an accomplice, and his evidence requires proper corroboration. (In this case it is not stated what was the direction given to the Jury, and it was not necessary to consider it, as the case came up for confirmation of sentence of death).

The Madras High Court, in *Reg. v. Ramasami*²⁹⁸, refused to interfere with the verdict of guilty, of the Jury, although there was no evidence to corroborate the testimony of the accomplice, and held that though the tainted evidence of an accomplice should be carefully scanned and received with caution, and may be treated as unworthy of credit, yet, if the Jury in the one case, or the Court in the other, credits the evidence, a conviction proceeding upon it is not illegal, and that if the decision in *Reg. v. Budhu Nanku*,²⁹⁹ intended lay it down in broad terms that the evidence of an accomplice is not receivable unless corroborated, that High Court could not agree with that decision. (In this

297. (1873) 20 W. R. 19.

298. (1878) 1 M. 394 : 2 Weir 799, *per* Morgan C. J. and Kindersley J. See also Ramaswami

(1903) 27 M. 271 : 14 M. L. J. 226 : 2 Weir 803 : 1 Cr. L. J. 641.

299. (1876) 1 B. 475.

case the Judge had impliedly instructed the Jury that the evidence of an accomplice is receivable without corroboration. The Madras High Court held the instruction to be erroneous, but refused to interfere with the verdict on that ground, as it tended to favour the accused rather than prejudice him).

In the case of *Q. E. v. Ramsaran*³⁰⁰ (which was not a case of trial by Jury and came up before the High Court for confirmation of death sentence), R, S and M were tried upon a charge of murder and the evidence for the prosecution consisted of (1) the confession of P, who was jointly tried with them for the same offence, (2) the evidence of an accomplice, (3) the evidence of witnesses who deposed to the discovery in R's house of property belonging to the deceased, and (4) the evidence of witnesses, who deposed that, on the day when the deceased was last seen alive, all the prisoners were seen together near the place where the body was afterwards found; *Held*, that there was no sufficient corroboration of the statements of the accomplice or of the confessing prisoner P; and that the possession of property taken from a murdered person is not adequate corroboration of the evidence of an accomplice charging such person in possession with participation in the murder; though it would no doubt be corroboration of evidence that the prisoner participated in a robbery, or that he had dishonestly received stolen property. Straight, J., summed up the law on the subject of corroboration of an accomplice's evidence to the following effect:—"The law in India, as expressed in S. 133 and S. 114 of the Evidence Act, and which is in no respect different from the law of England on the subject, is that a conviction based on the uncorroborated testimony of an accomplice is not *illegal*, that is, it is not unlawful; but experience shows that it is unsafe, and hence *it is the practice* of the Judges, both in England and in India, when sitting alone, to guard their minds carefully against acting upon such evidence when uncorroborated, *and when trying a case with a Jury, to warn the Jury that such a course is unsafe*. There must be some corroboration independent of the accomplice, or of a co-confessing prisoner, to show that the party accused was actually engaged directly in the commission of the crime charged against him. A second accomplice does not improve the position of the first, and, if there are two, it is necessary that both should be corroborated. The accomplice must be corroborated, not only as to one, but as to all of the persons affected by the evidence, and corroboration of his evidence as to one prisoner does not entitle his evidence against another to be accepted without corroboration". These observations were explained and the said case was distinguished by Straight, J. himself in *Q. E. v. Gobardhan*.³⁰¹ There he said: "In the case of *Q. E. v. Ramsaran*,³⁰² I, imperfectly no doubt, endeavoured to point out, for my own guidance and that of the Subordinate Courts, what the *rule of practice* appeared to me to be in reference to the evidence of accomplices as embodied in the Sections of the Evidence Act here, and illustrated by the decisions of the English Judges. * * *I could not for a moment pretend to lay down any hard and fast rule* as to how questions of fact were to be deter-

300. (1885) 8 A. 306 : 5 A. W. N. 311 [referring to Webb 6 C. and P. 595; Dyke 8 C. and P. 261, Addis 6 C. and P. 383 and Wilkes 7 C. and P. 272]. See also Baldeo (1836) 8 A. 509 : 6 A. W. N. 176.

301. (1887) 9 A. 528 : 7 A. W. N. 156.

302. (1885) 8 A. 306 : 5 A. W. N. 311.

mined. I do not think that a Judge or a Jury, in trying a man upon one set of facts, can rightly or properly be influenced by the decision, which some other Judge or some other Jury has arrived at upon facts some of which may be similar, but which cannot be identically the same. Every case, as far as its decisions are concerned upon the merits, must stand or fall on the particular facts proved; and it is obvious that while, in one instance, the intrinsic truth and probability of an accomplice's evidence would necessitate the looking for slight evidence of corroboration of the kind mentioned in *Q. E. v. Ramsaran*,³⁰³ in another its inherent improbability would cast upon the Court the obligation of requiring very full support from independent materials." In the same case³⁰⁴ Edge, C.J., observed:—"A Judge would advise a Jury that it would be unsafe to act upon, in other words, to believe, the uncorroborated evidence of an accomplice, as he would advise the Jury not to act upon evidence of any other witness whose evidence might, from any cause, be open to suspicion, but in either case, he would have to tell the Jury that, if they believed the evidence, they might legally convict the prisoner. Confusion on this question has sometimes arisen from *overlooking the distinction between a caution to be given to a Jury and a direction on law*. The questions of fact are for the Jury to find on the evidence. On questions of law the Jury must accept the direction of the Judge. Similarly, a Judge, when trying a case without a Jury, must as a juror, come to a finding on the facts, and, as a Judge, direct himself upon the law. *I do not think that it has ever been suggested that the advice of a Judge to a Jury not to act upon the uncorroborated evidence of an accomplice is a direction on law*. It appears to me, speaking generally, that an accomplice who is being tried or who is awaiting his trial, is more likely to tell a false story, with the object of exculpating himself, than is an accomplice who has already been tried and sentenced, and knows his fate." The learned Chief Justice next observed: "If Judges were to decide Criminal or other cases, so far as questions of fact are concerned, on their supposed analogy to a previous case, the Judges would not be exercising their own independent judgment upon the facts before them in the particular case, but would be accepting and leaning on the findings of facts of other Judges in the previous case, and would be applying such findings to the particular case, on the speculative assumption that the other Judges would take the same view of the evidence in the particular case in hand which they had taken of the evidence in the previous case." He then expresses his opinion in the following terms:—"As a general rule it would, I think, be most unsafe to convict an accused person on the uncorroborated evidence of an accomplice. *The evidence of an accomplice, whether it be corroborated or not, must, like the evidence of any other witness, be considered and weighed by the Judge, who, in doing so, should not overlook the position in which the accomplice, at the time of giving his evidence, may stand, and the motives which he may have for stating what is false*. If the Judge, after making due allowance for these considerations and the probabilities of the story, comes to the conclusion, that the evidence of the accomplice, although uncorroborated, is true, it is his duty to act upon the strength of his convictions".

303. Ibid.

304. In this view Stratght, J. also concurred with him

and also in the view taken by Glover J. in Ramsodoy (1873) 20 W. R. 19.

(The above case was an appeal from the judgment of the Sessions Judge sitting with assessors, acquitting the prisoner on a charge of murder. The appeal preferred by the Local Government came up before Edge, C. J., and Brodhurst, J., who differed, and the matter came up before Straight, J., who concurred with the Chief Justice in believing the evidence of the accomplice who had already been tried and sentenced and also in holding that there was a corroboration in the fact that the prisoner absconded soon after the murder. Brodhurst, J., on the other hand, could not put any reliance on the evidence of the accomplice and also held that the fact of absconding would be relevant but would not be sufficient for corroboration).

In *Q. E. v. Maganlal*,³⁰⁵ Scott, J., observes : "By the law both of India and England, the evidence of an accomplice is admissible, and a conviction is not illegal because it proceeds upon the uncorroborated testimony of an accomplice (S. 133). But the presumption allowed by ill. (b) of S. 114 of the Evidence Act, that an accomplice is unworthy of credit unless he is corroborated in material particulars, *has become a rule of practice of almost universal application. Judges now, in their charge, usually tell a Jury that under ordinary circumstances it is unsafe to convict on such evidence without the substantial corroboration of independent evidence.* A Judge who combines the functions of Judge and Jury is equally bound to scrutinize accomplice evidence with great care and to consider whether there is any corroborating evidence when the main evidence is of an accomplice character. There may be, however, *cases of an exceptional character* in which the accomplice evidence alone convinces a Judge of the facts required to be proved, and S. 133 would support him if he acted on that conviction without the corroboration usually insisted on." (This case came up on revision before the High Court. There was no difference in opinion on the point of law and practice. But while Scott, J. held that there were exceptional circumstances in the case which would justify the belief in the accomplice's testimony, Bayley and Jardine, JJ., held, that there were no such exceptional circumstances and that this testimony could not be believed without independent corroboration).

In *Q. E. v. Chagan Dayaram*,³⁰⁶ Jardine, J., says :—"So long-established a rule of practice as that which makes it prudent, as a general rule, to require corroboration of accomplices cannot, without great danger to society, be ignored by the Magistrates and Sessions Judges, simply because S. 133 of the Evidence Act declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice." *The rule in S. 114. Ill. (b) and that in S. 133 are part of one subject, and both are found in most of the great judgments mentioned in our judgments in that case (Maganlal's case, ante); and neither Section is to be ignored in the exercise of judicial discretion. The ill. (b) is, however, the rule, and when it is departed from, I think the Court should show, or that it should appear, that the circumstances justify the exceptional treatment of the case.*" In the same case Birdwood, J., however, remarked :—"A conviction is not illegal merely because it proceeds on the uncorroborated evidence of an accomplice. Such evidence, being

305. (1889) 14 B. 115, 119.

306. (1890) 14 B. 331, 344. See also *Genu Gopal* (1896) Rat. 840.

admissible, furnishes as legal a basis for a conviction as any other evidence which is admissible. The omission to follow the established rule of practice as to the corroboration of such evidence does not constitute an error in law ; but where the evidence of an accomplice is not of a character to warrant the refusal of a Court to apply to it the maxim enunciated in ill. (b) of S. 114 of the Evidence Act I of 1872, a conviction based on such evidence alone would be of questionable propriety."³⁰⁷ (In this case the conviction and sentence were set aside as the circumstances connected with the preparation and conduct of the case, as disclosed by the record, and portions of the evidence adduced at the trial showed that it would not be proper to act on that evidence).

In *E. v. Shrinivas*,³⁰⁸ Jenkins. C. J., and Russel. J., held that S. 133 is the only absolute rule of law as regards the evidence of accomplices, but there is the rule of guidance to which the Court also should have regard ; that rule of guidance is to be found in ill. (b) to S. 114 of the Evidence Act ; this Section enacts a rule of presumption, and read with S. 4 of the Act, it indicates that it is not a hard and fast presumption incapable of rebuttal, a *presumptio juris et de jure*.

The Bombay High Court has laid down a definite rule of prudence, though not as an absolute rule of law, that the evidence of an accomplice, however trustworthy it may be, should not be acted upon unless it is corroborated as against a particular accused in material respects. The case of an accused who is convicted upon his own plea and then appears as a witness against his co-accused comes within the ambit of this rule.³⁰⁹

In the Full Bench case of *Nga Po Chit v. E.*³¹⁰ Fox, C. J., after observing that some of the dicta of Judges in India are difficult to reconcile with others and with the law as laid down by the Indian Legislature and commenting on Ss. 133 and 114 of the Evidence Act, states : "How then must the evidence of an accomplice be dealt with in order to give full effect to both the maxim and the rule in S. 133. It appears to me that the answer is that *evidence of an accomplice must be regarded as prima facie unsafe* to convict any one on, unless it is corroborated in material particulars by the evidence of witnesses whose evidence can be relied on ; but bearing in mind that a person may be convicted on the uncorroborated evidence of an accomplice, every endeavour must be made to test the truth of such evidence by the Judge who has to come to a decision on it, and keeping before his mind the possibility of the accomplice speaking falsely, he should, as far as possible, search for the motives which have prompted the accomplice to say what he has said, and for the circumstances which have led up to his disclosures and give the evidence generally the most rigid tests possible in his endeavour to ascertain the true facts. If after a thorough test of the evidence the Judge is satisfied that the accomplice has spoken the truth, and his evidence brings home a crime to an accused person, then the Judge should convict the accused of the crime. The decision in

307. Chagan Dayaram (1890) 14 B. 331, 335.

308. (1935) 7 Bom. L. R. 969 : 3 Cr. L. J. 33.

309. Allisab (1932) 34 Bom. L.R. 1453 : 34 Cr. L. J. 136 : A. I. R. 1933 B. 24 : 141 I. C. 347.

310. (1910) 4 Bur. L. T. 50 (F. B.) : 12 Cr. L. J. 132 : 9 I. C. 778.

each case must depend on its own particular circumstances, and *no general rule can be laid down* as to when an accomplice's uncorroborated evidence alone should be accepted and acted on against an accused."

In *K. E. v. Nilakanta*,³¹¹ White C. J., and Ayling, J., *held*, that the view that a Court cannot act on the evidence of an accomplice unless it is corroborated, is not the law either of England or of India. As regards India, the substantive enactment is to be found in S. 133. S. 114 deals with presumptions of fact *and the illustration would seem to mean that* a presumption of fact may be drawn, having regard to the facts of a particular case, that the uncorroborated evidence of an accomplice in that case is untrue. The High Courts in this country have always proposed, *as a matter of practice rather than of law*, to act upon the principles established in England. In a case where the Court is both Judge and Jury, it has to direct itself thus :—"Consider the evidence of the approver, always bear it in mind that it is tainted evidence, scrutinize it with the utmost care and accept it with the greatest caution, consider it in the light of the circumstances in which it is given and in the light of all the other circumstances in the case of which evidence is legally admissible, then if you believe it, act on it, even if there be no corroboration in the strict sense of the word. If you do not believe it, reject it."

In the same case Sankaran Nair, J., said that, as to the necessity of corroboration, according to the English law, the *presumption must first be drawn* that the evidence of an accomplice is untrustworthy. All the Courts in England are agreed that a conviction by a Jury on the uncorroborated testimony, when the Judge has not cautioned them against accepting it, must be set aside. In England, therefore, the law is that a prisoner is not to be convicted, "*except under very special circumstances*, upon the uncorroborated testimony of an accomplice." In this country we are governed by the Indian Evidence Act which embodies the rules of English law on the point ; and the *presumption must first be drawn* that the evidence of an accomplice is unreliable and exceptional circumstances must be proved to justify its acceptance. S. 114 is intended to get rid of any artificial rules of the effect of evidence and to give them the effect of presumptions or maxims. The illustrations here given are for the most part such rules of evidence as are treated as presumptions of law ; the Act converts them into maxims or presumptions to be drawn by the Court. The Courts, *save in exceptional circumstances*, are bound first to draw the *presumption* as indicated by the Section. The law is the same as in England, and is rightly laid down in the Indian cases. The conclusions to be drawn, therefore, are that :—

(1) The question is not whether a conviction based on the uncorroborated testimony of an accomplice is legal, but whether there is a presumption that such testimony cannot be accepted without corroboration ;

(2) A person should not be convicted, except under "very special circumstances," upon the uncorroborated testimony of an accomplice ;

311. (1912) 35 M. 247 (S. B.) : 13 Cr. L. J. 305 :
14 I. C. 849.

(3) "The special circumstances" are that the grounds on which an accomplice's evidence has been held to be untrustworthy, did not exist in the case or did not exist in their full strength ; that there are countervailing considerations of greater weight which diminish or entirely get rid of the weight due to such presumption ;

(4) In cases tried by Jury, they have to be advised by the Judge of what has been above referred to.

In *Muthukumarasawmi Pillai v. E.*,³¹² before the Special Bench composed of five Judges—Benson, Wallis, Miller, Abdur Rahim and Sundara Aiyar, JJ., the following questions came up for decision, amongst others : "Does the evidence of an accomplice require corroboration in material particulars before it can be acted upon ? Is it open to the Court to convict upon the uncorroborated testimony of an accomplice if the Court is satisfied that the evidence is true ? And, does not the Indian Evidence Act, S. 133, read with S. 114 III. (b) merely intend to lay down that conviction upon the uncorroborated testimony of an accomplice is not illegal where the presumption of untrustworthiness attaching to the evidence of an accomplice is rebutted by special circumstances ?" It was *held*, by Benson, Wallis and Miller JJ., that there is nothing in ill. (b) to S. 114, which overrides, or renders nugatory, the plain and explicit provision contained in S. 133, or which requires us to hold that the evidence of an accomplice must always and in all circumstances be regarded as unworthy of credit unless it is corroborated in material particulars, or which requires us to hold that it is not open to the Court to act on such evidence, even when the Court believes it to be perfectly true. It is impossible consistently with the Indian Evidence Act to hold that, *as a matter of law*, the presumption must be raised and rebutted by special circumstances or by corroboration. *Per* Abdur Rahim, J.,—"My conclusion is that it is well-established law that, *except in circumstances of an especial nature*, it is the duty of the Court to raise the presumption that accomplice's evidence is unworthy of credit as against the accused person, unless it is corroborated in material particulars, *and the failure of the Judge to direct the Jury to that effect is an error in law*. It will, none the less, in my opinion, be an error in law if the trial was held without a Jury and the Judge or Magistrate misdirected himself on the point and treated an accomplice's evidence like that of any other witness. I do not perceive any principle on which the two cases may be distinguished. The next proposition which is also well-recognised is that, if there are any especial circumstances which would justify a disregard of this rule, those circumstances, in a trial by Jury, must be clearly set out in the directions of the Judge, and the appellate Court is entitled to consider *as a matter of law* whether these circumstances are such as to justify the exceptional treatment. If, in the opinion of the appellate Court, the facts in this connection are such that they in no sense negative the danger of acting upon the uncorroborated testimony of the accomplice, but the Judge told the Jury otherwise, the verdict must be set aside as being due to an error in law ; if the especial facts, however, are such as may reasonably be considered to take the case out of the rule, even though it is possible to hold a different view, the verdict

312. (1912) 35 M. 397 : 13 Cr. L. J. 352 : 14 I. C.

cannot be interfered with by a Court of error. A similar rule would hold good in cases tried by a Judge alone."

Per Sundara Iyer, J.,—"There can be no doubt that S. 114 should be read along with S. 133 in order to determine the manner in which the testimony of an accomplice should be dealt with before basing the conviction on his evidence alone. It is impossible to hold that the Court is in all cases bound to make a presumption of untrustworthiness without regard to the particular facts and circumstances of each case; for, in that case, the Legislature would have said that the Court "*shall presume*" the untrustworthiness of an accomplice. But the Judge is, of course, bound to exercise his judicial discretion to presume or not to presume the untrustworthiness of an accomplice in a judicial and legal manner. On an appeal from his decision it would be open to the Court of appeal to consider whether he was right or wrong in not making the presumption in the circumstances. If the question be whether there is an error of law in his judgment, the Court is entitled to consider whether the rule embodied in S. 114 was present to his mind and whether he exercised his discretion after considering the materials on record. If he has not made the presumption and has given no reason for not doing so, it would be open to the Court of review or revision to arrive at the conclusion that the discretion has not been exercised in a legal manner. *It would be right to require that a Judge should ordinarily presume the untrustworthiness of an accomplice.* But I would not put it, as suggested in the Advocate-General's Certificate, that it should be made in all cases and that the conviction without independent corroboration could be sustained only where the presumption is rebutted by special circumstances."

In *Balmokand v. Cr.*³¹³ Johnstone, J., *held* that notwithstanding S. 114(b) the Courts are not tied down in any technical way, but it is their duty, when deciding (1) whether any corroboration of a particular accomplice is required and (2) what amount or kind of corroboration is required, to look at the question as a prudent man, desiring to avoid error and to arrive at the truth, would look at it. As a general rule, corroboration is necessary; but as to the extent and nature of such corroboration, no hard and fast rule can be stated.

In *Narain Das v. Cr.*³¹⁴ Scott-Smith and Broadway, JJ., *held*, that S. 133 of the Evidence Act contains the rule of law regarding the testimony of accomplices and S. 114, III (b) is merely a guide to assist the Court; though in a vast majority of cases prudence requires that there should be corroboration.

In *Madan Guru v. E.*³¹⁵ Mullick and Thornhill, JJ., *held*, that it is a *rule of practice* founded on experience that in every case where an accomplice has given evidence the Court must raise a presumption that he is unworthy of credit unless corroborated in material particulars; failure to raise the presumption is an error of law, but the degree of weight to be attached to the presumption is a matter to be judged on the facts of each case.

313. (1915) 16 Cr. L. J. 354 : 28 I. C. 738 (Punj).

314. (1922) 3 L. 144 : 23 Cr. L. J. 513 : A. I. R. 1922 L. 1 : 68 I. C. 113 [relying on *Balmokand*

(1915) 16 Cr. L. J. 354 : 28 I. C. 738 (Punj.)]

315. (1918) 24 Cr. L. J. 723 : 73 I. C. 963 (P.)

In *Govinda v. K. E.*³¹⁶ Halifax and Macnair A. J. C's. *held*, that a conviction is not illegal merely because it is based on the uncorroborated testimony of an accomplice which has been believed. The Illustrations appended to S. 114 are not statements of law qualified only by particular exceptions. They are merely what they call themselves, illustrations or instances of the applications of certain maxims out of many possible instances.

In a recent Patna case, *Raghunath v. E.*³¹⁷ it has been observed,—“There are decisions in which it has been held that the testimony of one accomplice cannot safely be relied on as a material corroboration of that of another accomplice ; and that the material corroboration required means corroboration as against individual accused. It has however been pointed out in *Rattan v. E.*, 8 P. 235 : 30 Cr. L. J. 137., that S. 133 has made it clear that there is no hard and fast rule that a conviction cannot be supported which proceeds on the uncorroborated testimony of an accomplice and that a Court has to decide with reference to the facts of each case whether the presumption of unreliability arising from the suspicion which an accomplice's testimony invites has been rebutted. Indeed S. 114 Evidence Act itself indicates that it is for the Court to consider whether the maxims given in the illustrations do or do not apply to the particular case before it. * * * The decision in *E. v. Mulhar*, 26B 193 was approved in *Deo Nandan v. E.*, 33 C. 649 with the remarks that in considering whether the rule of practice (that it is generally unsafe to convict an accused on the evidence of an accomplice unless corroborated) applies to any particular case it must be remembered that all persons coming technically within the category of accomplices cannot be treated as precisely on the same footing and that no general rule on the subject can be laid down.”

In *Ram Prasad v. E.*³¹⁸ it was said thus :—“The evidence of accomplices is always admissible and is always relevant but under a very old practice of the Courts in England such evidence is accepted with only great caution and after the closest scrutiny and is not usually accepted against any person unless it is corroborated. Although it is not illegal to convict on the uncorroborated evidence of an accomplice, there is a consensus of opinion that a conviction on the uncorroborated evidence of an accomplice is rarely justifiable. The practice in India is the same as the practice in England. Evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms in some material particulars not only the evidence that the crime has been committed, but also that the prisoner committed it, although it is not necessary that there should be confirmation of all the circumstances of the crime. The corroboration need not be direct evidence that the accused committed the crime ; it is sufficient if it is merely circumstantial evidence of his connection with the crime”. In *Shibdhan v. E.*³¹⁹ it has been held by the Lahore High Court that it is a

316. (1902) 17 N. L. R. 113 : 23 Cr. L. J. 673 : 69 I. C. 257 [relying on *Gobardhan* (1837) 9 A. 528 : 7 A. W. N. 156, and *Nilakanta* (1912) 35 M. 247 : 13 Cr. L. J. 305 : 14 I. C. 849 ; and dissenting from *Ram Saran* (1885) 8 A. 306 : 5 A. W. N. 311.

317. (1932) 34 Cr. L. J. 421 : A. I. R. 1933 P. 96 : 142 I. C. 809.

318. (1927) 2 Luck 631 : 29 Cr. L. J. 129 : A. I. R. 1927 O. 369 : 106 I. C. 721 [referring to *Baskerville* (1916) 2 K. B. 658.]

319. (1933) 34 P. L. R. 660 : 34 Cr. L. J. 1129 : A. I. R. 1933 L. 838 : 145 I. C. 752.

well-established rule of practice, which has been followed consistently by the Lahore High Court for a number of years that no conviction can be based on the uncorroborated testimony of an approver and that this rule of practice is not to be departed from on the ground that the approver has no enmity with the accused and that his statement being a detailed one, it must be true in its entirety and must be given effect to.

We need not cite other opinions. Those already cited represent generally the different views on the subject. On analyzing these we come to the following conclusions :—

(1) A Court may convict an accused on the uncorroborated testimony of an accomplice.

(2) As to the applicability of S. 114 Illus. (b) some Judges are of opinion that a Court is not, as a matter of law, bound to raise the presumption in every case, but it may, after careful scrutiny and due appreciation of the surrounding circumstances in a particular case and keeping in mind the tainted character of the evidence, believe the uncorroborated testimony of an accomplice and act upon it.

(3) Others are of opinion that the presumption under S. 114 Illus. (b) must first be raised as a matter of law (or as a matter of practice, having all the reverence of law), and a conviction cannot be based on the uncorroborated testimony of an accomplice unless there be special circumstances rebutting the presumption.

(4) All the Judges seem to agree that accomplice-evidence is tainted and needs special treatment, and that ordinarily, and as a matter of practice, a Court should not convict on uncorroborated testimony.³²⁰

(5) The Jury should be informed of the law on the subject as stated above and directed to act accordingly.

Reasons for considering an accomplice to be untrustworthy.—

Accomplices are not like ordinary witnesses in respect of credibility but their evidence is tainted and should be carefully scrutinized before being accepted. They do not stand on the same footing as ordinary witnesses. The reasons are :—

(1) The danger of acting upon the evidence of an accomplice, who is admitted to give evidence for the Crown, arises not merely from the fact of his having committed a crime, but from the fact of his giving evidence under the hope or expectation of pardon, and of his obtaining immunity from punishment if his evidence be believed.³²¹

(2) There is often a danger that, for the purpose of saving themselves rather than stating the truth, the accomplices will make out a stronger case against the prisoner and more favourable to themselves than the real truth will warrant.³²²

320. *Rajoni Kant V. Asan* (1895) 2 C. W. N. 672 ;
Bepin (1884) 10 C. 970, 975.

321. *Elahee Buksh* (1866) 5 W. R. 80 (F. B.), *per*
Barnes Peacock C. J. ; *Jamaldi* (1923) 51 C.

160, 163 : 28 C. W. N. 536 : 25 Cr. L. J.
 1000 : A. I. R. 1924 C. 701 : 81 I. C. 712.

322. *Maganlal* (1889) 14 B. 115, *per* *Jardine J.*
 quoting *Tindal C. J.*

(3) An accomplice will try to throw the guilt upon others.³²³ When a man is fixed and knows that his own guilt is detected, he may purchase immunity by falsely accusing others.³²⁴ There always exists in the mind of persons who are themselves liable to punishment, a notion that they will obtain benefit by procuring the conviction of others.³²⁵

(4) The accomplice may know every circumstance of the crime, and while relating all the other facts truly may, in order to save a friend or gratify an animosity, name some person as one of the criminals who is innocent of the crime.³²⁶

(5) The accomplice, who gives the evidence, comes before the Court, practically with the statement :—'I have so little sense of justice that I do not object to commit a crime', and consequently his testimony cannot be taken as of sufficient value to subject a man to punishment.³²⁷

(6) The accomplice, or in other words a participator in the crime, is a person of bad character and his evidence, although given under the sanction of an oath, is open to suspicion and further, evidence given in expectation of any hope of pardon is sure to be biased in favour of the prosecution.³²⁸

Nature and Extent of corroboration.—Evidence must be identifying the accused with the offence.—

'Facts which tend to render more probable the truth of a witness's testimony on any material point are admissible in corroboration thereof although otherwise irrelevant to the issue and although happening before the date of the fact to be corroborated. * * But facts which are not more consistent with the truth of such testimony than the reverse are inadmissible. The corroborative facts and evidence must, however, be proved otherwise than by the testimony of the witness to be corroborated and the question of admissibility is one of law for the Judge and not one of fact for the Jury.'³²⁹

A man who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history without identifying the persons, that is really no corroboration at all.³³⁰ "There is a great difference between confirmations as to the circumstances of the felony and those which apply to the individuals charged : The former only prove that the accomplice was present at the commission of the offence ; the latter show that the prisoner was connected with it. This distinction

323. Maganlal (1889) 14 B. 115, *per* Scott J.

324. Farler 8 C. and P. 106 *per* Lord Abinger ;
Kamala Prasad V. Sital Prasad (1901) 28 C.
339, 342 : 5 C. W. N. 517.

325. Reaz Ali (1866) 6 W. R. 77.

326. Krishnabhat (1885) 10 B. 319, 327 ; Chutter-
dharee (1866) 5 W. R. 59 ; Elahee Buksh
(1866) 5 W.R. 80 (F. B.) ; Genu Gopal (1896)
Rat. 840.

327. Kallu (1884) 7 A. 160 : 4 A. W. N. 314.

328. Kamala Prasad v. Sital Prasad (1901) 28 C.
339, 342 : 5 C. W. N. 517 ; Nilakanta (1912)
35 M. 247, 347 (S. B.) : 13 Cr. L. J. 305 : 14
I. C. 849 ; Muthukumarasawmi (1912) 35 M.
397, 479 (F. B.) : 13 Cr. L. J. 352 : 14 I. C.
896.

329. Phipson on Evidence, 482 3.

330. *Per* Lord Abinger in Farler 8 C. and P. 106.

ought always to be attended to. The confirmation as to the commission of the felony is really no confirmation at all, because it would be confirmation as much, if the accusation were against you and me, as it would be as to those prisoners who are now upon their trial. The confirmation which I always advise juries to require is the confirmation of the accomplice in some fact which goes to fix the guilt on the particular person charged. You may legally convict on the evidence of an accomplice only if you can safely rely on his testimony; but I advise juries never to act on the evidence of an accomplice, unless he is confirmed as to the particular person who is charged with the offence".³³¹ "When an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the Judge to advise the Jury that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed, for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the case".³³² "The opinion expressed by Chief Justice Jervis in *Rex v. Stubbs* (*ante*) appears to be the correct one; for nothing is more easy than for an accomplice to accuse an innocent person in order to get off his real companion in guilt, and to attribute to the persons falsely accused acts which were really committed by the guilty companion".³³³ In *Rex v. Baskerville*³³⁴ the Court of Criminal Appeal observed thus:—A review of the cases on the evidence of accomplices shews that the law is that laid down in *Stubbs* (1855) Dears. 555 viz:—"The rule that a Jury should not convict on the unsupported evidence of an accomplice is a rule of practice only and not a rule of law. *Semble*, that a Judge should advise the Jury to acquit unless the testimony of the accomplice be corroborated not only as to the circumstances of the offence, but also as to the participation in it by the accused, and that where there are several prisoners and the accomplice is not confirmed as to all, the Jury should be directed to acquit the prisoners as to whom he is not confirmed; we held that this being a rule of practice only, if a Jury choose to act on the unconfirmed testimony of the accomplice the conviction cannot be quashed as bad in law".

The corroboration of the accomplice's testimony in material particulars, therefore, means that the accomplice ought to be corroborated in some material circumstances, such *circumstances connecting and identifying the prisoner with the offence*.³³⁵

The corroboration should be such corroboration in material particulars as would induce a prudent man, on the consideration of all the circumstances, to believe that the evidence of

331. *Per* Alderson, B. in *Wilkes* 7 C. and P. 272.

332. *Per* Jervis C. J. in *Stubbs* (1855) Dears 555: 25 L. J. M. C. 16.

333. *Per* Sir Barnes Peacock C. J. in *Elahee Buksh* (1866) 5 W. R. 80 (F. B.) [following *Farter* 8 C. and P. 106; *Wilkes* 7 C. and P. 273 and *Stubbs* (1855) Dears 555: 25 L. J. M. C. 16.] *See also* *Amar Nath* (1930) 32 Cr. L.J. 1049: A. I. R. 1931 L. 406: 133 I. C. 639; *Nanak Chand* (1931) 32 P. L. R. 792: 32 Cr. L. J. 1036; A. I. R. 1932 L. 73: 133 I. C. 545.

334. (1916) 2 K. B. 658. *See also* *Beebe* (1925) 19 Cr. A. R. 22.

335. *Nawab Jan* (1867) 8 W. R. 19, 23; *Mohesh* (1873) 19 W. R. 16; *Chutterdharee* (1866) 5 W. R. 59; *Ashootosh* (1878) 4 C. 483 (F. B.); 3 C. L. R. 270; *Ram Saran* (1885) 8 A. 306; 5 A. W. N. 311; *Baji Krishna* (1904) 6 Bom. L. R. 481: 1 Cr. L. J. 568; *Bepin* (1884) 10 C. 970; *Jamiruddi* (1902) 29 C. 782: 6 C. W. N. 553; *Makbul* (1911) 12 Cr. L. J. 537: 12 I. C. 513 (O.)

the accomplice is true not only as to the narrative of an offence committed but also so far it affects *each* person thereby implicated.³³⁶ Any of the prisoners, as to whom the accomplice's testimony is not supported, should be acquitted.³³⁷

Corroborative evidence consists of facts showing that the evidence of the accomplice is true,³³⁸ or adding weight to it.³³⁹ Evidence of witnesses corroborating the approver is not the less corroborative because it was given to the Police before the examination of the latter.³⁴⁰

Evidence must come from source independent of the accomplice character.—

The corroboration should be derived from evidence which is *independent* of accomplices. In saying that before the evidence of an accomplice can be safely depended upon, so far as it affects the prisoner, it is to be understood that other evidence from sources independent of the approver should be forthcoming relative to facts which implicate the prisoner in the same way, as the story of the approver does.³⁴¹ Corroboration should be derived from evidence which is not vitiated by the accomplice character of the witness.³⁴² What is required is corroboration by some untainted evidence.³⁴³

One accomplice's evidence is not corroboration of the testimony of another.³⁴⁴ Evidence of two or more accomplices requires confirmation equally with the testimony of one.³⁴⁵ In a case in which there were five accomplices, the Court of Criminal Appeal said that the Court will certainly not hold that the evidence of a number of accomplices needs any less corroboration than that of one accomplice.³⁴⁶ As to corroboration of evidence of persons who are accessories after the crime or who withhold information, see *Ramaswami v. E.* noted under the sub-heading "*Persons who are no better than accomplices*," *ante*. It has recently been held by the Privy Council that the evidence of an accessory must be corroborated in some material particulars, not only bearing upon the facts of the crime but upon the accused's implication therein. It has further been

336. Shrinivas (1905) 7 Bom. L. R. 969 : 3 Cr. L. J. 33 ; Ramsaran (1885) 8 A. 306, 312 : 5 A. W. N. 311 ; Baldeo (1886) 8 A. 509 : 6 A. W. N. 176 ; Rattan (1928) 8 P. 235 : 30 Cr. L. J. 137 : A. I. R. 1928 P. 630 : 113 I. C. 329

337. Imam (1867) 3 B. H. C. R. 57 ; Dhondi (1896) Rat 848.

338. Nilakanta (1912) 35 M. 247, 270 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849.

339. Nawab Jan (1867) 8 W. R. 19, 26.

340. In re Ibrahim (1925) 42 C. L. J. 496, 499 : 26 Cr. L. J. 1146 : A. I. R. 1926 C. 374 : 88 I. C. 458.

341. Bykunt (1868) 10 W. R. 17.

342. Mohesh (1873) 19 W. R. 16.

343. Siar Nonia (1913) 18 C. W. N. 550 : 15 Cr. L. J. 438 : 24 I. C. 174.

344. Noakes 5 C. and P. 326 ; Elahee Buksh (1866) 5 W. R. 80, 84 (F. B.) ; Baskerville (1916) 2 K. B. 658.

345. Dwarka (1866) 5 W. R. 18 ; Ram Saran (1885) 8 A. 306, 312 ; 5 A. W. N. 311 ; Ningappa (1900) 2 Bom. L. R. 610 ; Maganlal (1839) 14 B. 115 ; Chatur (1876) Rat 102 ; Lala (1921) 34 P. L. R. 1922 : 23 Cr. L. J. 158 : 65 I. C. 622.

346. Gay (1909) 2 Cr. A. R. 327 [As regards the nature or amount of corroboration required English authorities have not been so well agreed. For a summary, see Roscoe's Criminal Evidence, 15th Edn., pp. 152-154.]

held that the evidence of one accomplice is not available as corroboration of another, and this rule is now virtually a rule of law.^{347a}

An accomplice cannot be corroborated by his own previous statements within the meaning of S. 114 Evidence Act, though they are evidence under S. 157 of the Evidence Act.³⁴⁸

In *K. E. v. Nilkanta*,³⁴⁹ White, C. J and Ayling, J. said, "As to the character of the corroborative evidence which may lead the Court to believe that the evidence of an informer is true that must depend entirely upon the nature of the charge and the facts of the particular case. It is clear that oral testimony of independent witnesses is not necessary, but it seems impossible to lay down any hard and fast rule. Illustration to S. 114 uses the words "in material particulars", but what are material particulars must depend upon the facts of the particular case." In *Muthukumarswami v. K. E.*,³⁵⁰ Benson, Wallis and Miller JJ., held, that the previous statement of an accomplice can legally amount to corroboration of the evidence given by him at the trial. It was said,— "We cannot say as a matter of law that a prior statement can never be corroboration in material particulars, though no doubt, in the great majority of cases, it will be found that the prior statements do not add anything to the credibility of the evidence given at the trial. How far a prior statement does corroborate evidence given at the trial is a matter to be determined by the Jury" (or, when there is no Jury, by the Judge).

The statements made by some of the prisoners, when examined by the Magistrate, are not legal corroboration of the tainted evidence of the approver ; further, as the said statements were made in the absence of other prisoners whom it is intended to implicate thereby, they are of no weight at all, except as against those who made them.³⁵¹ Confession of a co-accused coupled with the evidence of the approver is not sufficient for a conviction ; the two together cannot obviate the necessity of corroboration from independent sources.³⁵² But the retracted confession of an accused may be sufficient corroboration of the approver's story as against himself.³⁵³ Tainted evidence is not

347. (1903) 27 M. 271, 278 : 14 M. L. J. 226 : 2 Weir 833 : 1 Cr. L. J. 641.

347. (a) Mahadeo (1936) 40 C. W. N. 1164 (P. C.) [referring to Baskerville (1916) 2 K. B. 658.]

348. Bepin (1884) 10 C. 970 ; Malapa (1874) 11 B. H. C. R. 196 ; Nilakanta (1912) 35 M. 247, 350 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849 [Per Sankaran Nair, J. ; *Contra per* White C. J. and Ayling, J.]

349. (1912) 35 M. 247, 270 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849.

350. (1912) 35 M. 327, 431 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896. *Contra per* Sundara Ayyar, J. at p. 524.

351. Bepin (1884) 10 C. 970 [referring to Malapa (1874) 11 B. H. C. R. 196 ; Budhu (1876) 1 B. 475 ; Jaffir Ali (1873) 19 W. R. 57 ; Naga (1875) 23 W. R. 24].

352. Jaffir Ali (1873) 19 W. R. 57 ; Mohesh (1873) 19 W. R. 16 ; Koonjo (1873) 20 W. R. 1 ; Sadhu (1874) 21 W. R. 69 ; Malapa (1874) 11 B. H. C. R. 196 ; Dosa Jiva (1885) 10 B. 231 ; Ram Saran (1885) 8 A 306 : 5 A. W. N. 311 ; Alagappan (1886) 2 Weir 742 ; Nazir (1932) 55 A. 91 : 34 Cr. L. J. 489 : A. I. R. 1933 A. 31 : 143 I. C. 67.

353. Pallia (1919) 12 P. W. R. 1919 : 20 Cr. L. J. 188 : 49 I. C. 604.

made better by being corroborated by other tainted evidence.³⁵⁴ But where immediately after a dacoity and before the arrival of the Police, one of the accused who had been caught made a confession to a private person, naming the other persons concerned in it except two, one of whom he named two days after in this confession to the Magistrate which agreed with the evidence subsequently given by the informer, both the confessions being afterwards retracted, and another accused made a confession naming all the persons mentioned by the approver, the two accused and the latter having been arrested at different times and places, and there was evidence that some of the dacoits were seen in company together shortly before the dacoity and that they were absent from their homes shortly after it; *Held*, that the confessions of the accused and the other facts were sufficient corroboration of an approver as against the co-accused who had not made confessions.³⁵⁵ There is nothing in S. 133 Evidence Act to suggest that the statement of one approver cannot be regarded as corroborating that made by another approver, though no doubt, if it could be shown that the approver had ample opportunity of consultation, the corroborative value would be greatly diminished.³⁵⁶ In a summing up in a trial for guilty receiving, the Jury must be emphatically warned against convicting on the uncorroborated evidence of an admitted thief.³⁵⁷

Extent of Corroboration.—

The amount of corroboration must depend on the circumstances of each case.³⁵⁸ Although the law declares that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, the Courts have held that ordinarily speaking the evidence of an accomplice should be corroborated in material particulars and the practice which has been laid down has become, one may say, a part of the law itself. At the same time it is quite clear from the cases that the amount of criminality is a matter for consideration. Where a person is only an accomplice by implication, or in a secondary sense, his evidence does not require the same amount of corroboration as that of the person who is actually concerned in the crime or participating in it with the principal offender. In dealing with the question, what amount of corroboration is required in the case of testimony given by an accomplice, the Courts must exercise careful discrimination and look at the surrounding circumstances in order to arrive at a conclusion whether the facts deposed to by the person alleged to be an accomplice are borne out by those circumstances, or whether the circumstances are of such a nature that the evidence purporting to be given by the alleged accomplice should be supported in essential and material particulars by evidence *aliunde* as to the facts deposed to by that accomplice. That seems to be the general principle.³⁵⁹ All persons

354. Baijoo (1876) 25 W. R. 43. *See also* Udhan (1873) 19 W. R. 68; Chand (1888) Rat. 403.

355. Lalan Mallik (1911) 16 C. W. N. 669; 13 Cr. L. J. 571; 15 I. C. 987.

356. Darya Singh (1923) 25 Cr. L. J. 520; A. I. R. 1923 L. 666; 77 I. C. 984.

357. Reynolds (1927) 20 Cr. A. R. 49.

358. Baji Krishna (1904) 6 Bom L. R. 481; 1 Cr. L. J. 568.

359. Kamala v. Sital (1901) 28 C. 339; 5 C. W. N. 517. *See also* Ramaswami (1903) 27 M 271; 14 M. L. J. 226; 2 Weir 803; 1 Cr. L.J. 641; Balmokand (1915) 16 Cr. L. J. 354; 28 I. C. 738 (Punj).

coming technically within the category of accomplices cannot be treated as on precisely the same footing. The nature of the offence and the circumstances in which the accomplices make their statements must always be considered. No general rule on the subject can be laid down. Where the question arises what amount of corroboration will suffice, it is obvious that the answer in each case must depend on the circumstances.³⁶⁰ The less heinous the offence disclosed, the less liable the evidence of the accomplice will be to suspicion and discredit.³⁶¹ If the crime is very deep and the witness far involved, he ought to be corroborated.³⁶²

It is sufficient if the corroborative evidence is confirmatory of *some of the leading circumstances* of the story of the approver as against the particular prisoner, so that the Court may be able to presume that he has told the truth as to the rest. The true rule on the subject is that if the Court is satisfied that the witness is speaking the truth in some material part of his testimony, in which it is seen that he is confirmed by unimpeachable evidence, there may be a just ground for believing that he also speaks truth in other parts as to which there may be no corroboration.³⁶³

The following remarks of the Attorney-General in *Despard's case*.³⁶⁴ quoted with approval in *Reg. v. Chatur*³⁶⁵ fully express the extent of corroboration that is necessary:—
“When I say accomplices ought to be confirmed by collateral testimony, do not mistake me to state that every word which an accomplice utters must be spoken to by some other witness, because if that were so there would be no need of an accomplice in any case but that of treason ; but the confirmation that is to be required for an accomplice is to show that the story, as related by him coincides with other circumstances, which are by unexceptional testimony proved to have existed, and when such circumstances, falling in with the testimony of the accomplice, cannot so easily be accounted for upon any other supposition than that of the truth of the story. When I say that is the state of the evidence, I apprehend the accomplice is sufficiently confirmed, and that there can be no difficulty in giving complete credit to his testimony.”

Reg. v. Chatur,³⁶⁶ also lays down that not only as to persons spoken of by an accomplice must there be corroborative evidence, but also as to *corpus delicti* there must be some *prima facie* evidence pointing the same way, to make the evidence of an accomplice satisfactory.³⁶⁷

The degree of weight to be attached to the presumption arising under S. 114 (b) of the

360. *Malhar* (1901) 26 B. 193, 197 : 3 Bom. L. R. 694.

361. *Lakhamsi Malsi* (1904) 29 B. 264 : 6 Bom. L. R. 1091 : 1 Cr. L. J. 1074.

362. *Ramaswami* (1903) 27 M. 271, 278 : 14 M. L. J. 226 : 2 Weir 803 : 1 Cr. L. J. 641.

363. *Kallachand* (1869) 11 W. R. 29 ; *Jamiruddi* (1902) 29 C. 782 : 6 C. W. N. 553.

364. 28 State Trials (1803) P. 346.

365. (1876) Rat. 102, 104. *See also* *Kunjan* (1888) 1 M. L. J. 397, 404 (F. B.) : 2 Weir 215 ; *Mahadeo* (1926) 27 Cr. L. J. 807, 810 : A. I. R. 1926 N. 426 : 95 I. C. 471.

366. (1876) Rat. 102.

367. *See also* *Budhu* (1876) 1 B. 475.

Evidence Act depends upon the facts of each case ;³⁶⁸ and so also how far corroborative evidence may be necessary.³⁶⁹ The amount of corroboration required depends upon the view taken by the Court of the approver's character and of his general demeanour in the witness-box.³⁷⁰ Slender but reliable corroboration held sufficient.³⁷¹

The strength of the presumption of untrustworthiness varies according to the extent to which the infirmities of accomplice evidence operate in each case.³⁷² It also varies according to the nature of the offence, the strength of the motives of falsehood, and the like.³⁷³ The slighter the evidence of the accomplice, the more distinct should be the caution for necessity of corroboration.³⁷⁴

Facts which corroborate.—

(a) Association.—Association of the accused persons under extraordinary circumstances and at a place where they are not likely to be unless there was concert, is some corroboration.³⁷⁵ The evidence that some of the dacoits were seen in company together shortly before the dacoity and that they were absent from their homes shortly after it, was held as corroborative evidence of the approver's testimony.³⁷⁶

That the accused was found in company of the approver shortly after the dacoity is very strong indication of fellowship in the crime.³⁷⁷ But presence in the company of approver, some days before the offence, is not material corroboration of the approver's statement to the effect that they joined him in the dacoity.³⁷⁸

(b) Presence at the scene of the occurrence is a fact in confirmation of the statement of the approver.³⁷⁹

(c) Absconding.—Where the accused absconded and remained away until he was arrested seven months after the murder and gave along with his witnesses a false account as to the time when he left his village : *Held*, that this is some corroboration of the approver's

358. Madan Guru (1918) 24 Cr. L. J. 723, 730 : 73 I. C. 963 (F).

369. Ashootosh (1878) 4 C 483 (F. B.) : 3 C. L. R. 270 ; Narain Das (1922) 3 L. 144 : 23 Cr. L. J. 513 : A. I. R. 1922 L. 1 : 68 I. C. 113. *See also* Nilakanta (1912) 35 M. 247, 270 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849 ; Muthukumarasawmi (1912) 35 M. 397, 441, 442 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896 ; Lalan Mallik (1911) 16 C. W. N. 669, 674 : 13 Cr. L. J. 571 : 15 I. C. 987.

370. Jagwa (1925) 5 P. 63, 75 : 27 Cr. L. J. 484 : A. I. R. 1926 P. 232 : 93 I. C. 884.

371. Khushi Muhammad (1923) 25 Cr. L. J. 979, 981 : A. I. R. 1924 L. 481 : 81 I. C. 627.

372. Nilakanta (1912) 35 M. 247, 347 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849.

373. Muthukumarasawmi (1912) 35 M. 397, 473 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896 ; Maganlal (1889) 14 B. 115, 123.

374. Warren (1902) 2 Cr. A. R. 194.

375. Farler 8 C. P. 106.

376. Lalan Mallik (1911) 16 C. W. N. 669 : 13 Cr. L. J. 571 : 15 I. C. 987. *See also* Khotub (1866) 6 W. R. 17.

377. Sahai Singh (1917) 21 P. W. R. 1917 : 18 Cr. L. J. 852 : 41 I. C. 820.

378. Hazara Singh (1924) 25 Cr. L. J. 1347 : A. I. R. 1924 L. 727 : 82 I. C. 737. *See also* Maksud Ali (1920) 2 P. L. J. 773 : 22 Cr. L. J. 200 : 60 I. C. 56.

379. Dwarka (1866) 5 W. R. 18.

evidence.³⁸⁰ But where the question is whether an act was accidental or intentional, the running away of the accused just after the occurrence is, generally speaking, hardly consistent with the theory of accident.³⁸¹

(d) Blood-stains on the person and clothes of the accused are ample corroboration.³⁸²

(e) Wound received on the person of the accused at the time of committing the dacoity is a direct corroboration as to the identity of the accused.³⁸³

(f) Possession of property removed by dacoity—if it be recent—is good corroborative evidence of the accused being concerned in the dacoity.³⁸⁴

(g) In a case of conspiracy to commit murder, the fact that shortly after the alleged date of the conspiracy the accused helped the approver in obtaining murderous weapons is corroborative.^{384a}

Facts which do not corroborate.—

(a) Motive.—Motive for the murder will not take the place of evidence of identification, nor will it afford corroboration of the confession.³⁸⁵ Motive is not a material particular. It is not the duty of the prosecution to prove any motive.³⁸⁶ However strong and convincing the evidence of an adequate motive may be that evidence can never by itself supply the want of all reliable evidence, direct or circumstantial, of the commission of the crime with which an accused person may be charged.³⁸⁷ On the other hand, where the evidence as to the crime is sufficiently convincing, it is immaterial to consider with what motive it was done.³⁸⁸

(b) Medical evidence.—The corroboration by the result of medical examination is corroboration in respect to a fact in the occurrence which does not help the prosecution in any way to prove that the prisoner was one of the persons who caused the deceased's death; it is corroboration of the accomplice's story against himself, but it is not in any degree corroboration of the story so far as it goes to implicate the prisoner.³⁸⁹

380. Gobardhan (1887) 9 A. 528 : 7 A. W. N. 156.
Contra per Brodhurst, J. See, however, Sorob Roy (1866) 5 W. R. 28 ; Asfar Sheikh (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52 ; Ghurbin (1884) 10 C. 1097.

381. Dwijendra (1915) 19 C. W. N. 1043 : 16 Cr. L. J. 724 : 31 I. C. 164.

382. Fattechand (1868) 5 B. H. C. R. 85.

383. Durbaroo (1870) 13 W. R. 14 ; Jaffir Ali (1873) 19 W. R. 57.

384. Khotub Sheik (1866) 6 W. R. 17 ; Kalla Chand (1869) 11 W. R. 21 ; Issen Mundle (1865) 3 W. R. 8 ; Baldeo (1886) 8 A. 509 : 6 A. W. N. 176.

384a. Tota Singh (1922) 23 Cr. L. J. 734 : 69 I. C. 462 (L.)

385. Dnyanu (1899) 1 Bom. L. R. 428, 430.

386. Tufani Sheik (1911) 15 C. L. J. 323 : 13 Cr. L. J. 283 ; 14 I. C. 667.

387. Vaithinatha (1913) 40 I. A. 193 : 36 M. 501 (P. C.) : 17 C. W. N. 1110 : 18 C. L. J. 365 : 15 Bom. L. R. 910 : 11 A. L. J. 881 : 14 Cr. L. J. 577 : 21 I. C. 369.

388. Dwijendra (1915) 19 C. W. N. 1043 : 16 Cr. L. J. 724 : 31 I. C. 164.

389. Sadhu Mundul (1874) 21 W. R. 69, 71.

(c) Letters found in accomplice's possession.—Letters found in the possession of an accomplice which were so ambiguously worded as to admit of no unfavourable inference being drawn against an accused person, without, in the first place, accepting as correct the interpretation suggested by the accomplice himself, were held not to afford any corroboration of the story told by the accomplice.³⁹⁰

(d) Marks of blood.—It is no corroboration of the approver's statements in material particulars that marks of blood were found at the spot which the approver pointed out as the place where the deceased fell.³⁹¹ But blood-stains on the person and clothes of the prisoner are ample corroboration.³⁹²

(e) Borrowing money.—In a charge of bribery against a person proof that money was borrowed by the man who paid the bribe shortly before the alleged payment, is no corroboration of the evidence of the accomplice as to payment. It shows only that he had money to pay. There must be proof of some circumstance that affects the person charged with the offence.³⁹³

(f) Absence from home.—The absence from home of the prisoner, on the night of the dacoity, would be no legal corroboration of the evidence of the approver; unless there was *prima-facie* sufficient legal evidence to convict him of the offence, he would not be bound to account for his movements.³⁹⁴

(g) Possession of murdered man's property—is no corroboration of the evidence of an accomplice that the prisoner murdered the deceased.³⁹⁵

(h) Finding of an instrument for committing crime.—The finding of a *Sindmaree* in the court-yard of the accused's house is no corroboration of the approver's statement, as it does not connect or identify the prisoner with the particular offence.³⁹⁶

(i) Cries of the attacking party making use of a prisoner's name are no corroborative evidence of approver's statement, when in fact the prisoner himself was not present with the attacking party but was miles distant from the place.³⁹⁷

(j) Statements of witnesses which, though giving rise to suspicion, were consistent with the innocence of the accused.³⁹⁸

Duty of the Judge when accomplice evidence is admitted.—Misdirection.—

We have already considered who is an accomplice and the duty of the Judge, when charging a Jury, as to how he should direct, if such a question arises. We have next consi-

390. Chatur (1876) Rat 102.

391. In re Muthan (1909) 10 Cr. L. J. 567 : 4 I. C. 391 (M).

392. Fettechand (1868) 5 B. H. C. R. 85.

393. In re Vyasa Rao (1911) 21 M. L. J. 283 : 12 Cr. L. J. 150 : 9 I. C. 897.

394. Bepin (1884) 10 C. 970.

395. Ram Saran (1885) 8 A. 306 : 5 A. W. N. 311 ; Mania Dayal (1836) 10 B. 497.

396. Tulsi Dosad (1869) 3 B. L. R. App. Cr. 66.

397. Nawab Jan (1867) 8 W. R. 19, 26.

398. Babar Ali (1914) 42 C. 789 : 19 C. W. N. 584 : 21 C. L. J. 492 : 16 Cr. L. J. 321 : 28 I. C. 657.

dered the law as to the reception of accomplice evidence. We shall now consider how the Judge should direct the Jury on other points and wherein misdirection lies, for, as has been observed by Sir Barnes Peacock in the Full Bench case of *Elahee Buksh*,³⁹⁹ accomplice evidence is not to be left to the Jury without such directions as the facts of the case require.

In all cases, whether the evidence of the accomplice is corroborated or not, the Judge should tell the Jury that they can legally convict on the uncorroborated testimony of an accomplice if, on all the facts and circumstances of the case and after careful scrutiny, they believe it to be true.⁴⁰⁰ But the Court must clearly state to the Jury the circumstances negating the presumption under S. 114(b).⁴⁰¹ If there be no such circumstances in the particular case, the Judge may under S. 298 Cr. P. C., express such opinion, and advise the Jury to acquit.⁴⁰² The Judge should point out such circumstances as the following, which may occur in any particular case, which go against believing the accomplice implicitly, unless otherwise corroborated, and failure to do which would seriously prejudice the accused: (1) That they were not merely accomplices giving evidence under a tender of pardon; they were men who had been previously convicted of dacoity, and had been pardoned for the purpose of giving evidence against other dacoits, and were kept in the pay of Government under the surveillance under which they were kept, abetted the dacoity in question and then again for saving themselves turned round and accused others of being their associates in the new crime.⁴⁰³ (2) That the approver was once pardoned but his statement before the Joint Magistrate was considered so unsatisfactory that he was again arraigned as an accused and the pardon was withdrawn; he was again re-admitted to pardon and was called as a witness though with great reluctance; and his statements before the Joint Magistrate and the Sessions Judge were not altogether consistent.⁴⁰⁴ (3) That the statements of the two approver-witnesses were full of discrepancies and in some very important points hopelessly irreconcilable.⁴⁰⁵ (4) Where the approver has given different versions of the occurrence in his previous statements.⁴⁰⁶ (5) That the approver witness had been hunted up after the case had been committed to the Sessions, and while his master, the prisoner, was in *hajat* awaiting his trial.⁴⁰⁷

If, after proper advice and guidance, the Jury convict on the uncorroborated testimony

399. (1866) 5 W. R. 80. *See also* Sadhu Mundul (1874) 21 W. R. 69; Muthukumarasawmi (1912) 35 M. 397 (F. B.): 13 Cr. L. J. 352: 14 I. C. 896.

400. Ramaswami (1903) 27 M. 271, 274, 287: 14 M. L. J. 226: 2 Weir 803: 1 Cr. L. J. 641; Nillakanta (1912) 35 M. 247, 267 (S. B.): 13 Cr. L. J. 305: 14 I. C. 849; Muthukumarasawmi (1912) 35 M. 397, 423, 438, 440, 452, 506 (F. B.): 13 Cr. L. J. 352: 14 I. C. 896; Gobardhan (1887) 9 A. 528, 554: 7 A. W. N. 156.

401. Muthukumarasawmi (1912) 35 M. 397, 454 (F. B.): 13 Cr. L. J. 352: 14 I. C. 896.

402. Ramaswami (1903) 27 M. 271, 288: 14 M. L. J. 226: 2 Weir 803: 1 Cr. L. J. 641; Muthukumarasawmi (1912) 35 M. 397, 506 (F. B.): 13 Cr. L. J. 352: 14 I. C. 896; Maganlal (1889) 14 B. 115, 144.

403. Elahee Buksh (1866) 5 W. R. 80, 90 (F. B.)

404. Nunhoo (1868) 9 W. R. 28.

405. Jaffir Ali (1873) 19 W. R. 57, 58.

406. Ramsodoy (1873) 20 W. R. 19, 20.

407. Nawab Jan (1867) 8 W. R. 19, 23.

of an accomplice, the High Court will not interfere with the verdict, even if the verdict was arrived at contrary to the advice of the Judge, for there is no matter of law upon which there can be an appeal to the High Court.⁴⁰⁸

But the Judge should at the same time point out that it was also not safe to accept his testimony without corroboration.⁴⁰⁹ Summing up must be emphatic on the danger of accepting the uncorroborated evidence of accomplices, and care must be taken that the suggested corroboration is, in fact, adequate.⁴¹⁰ The Sessions Judge should have told the Jury that, although the law permitted them to convict on the uncorroborated evidence of an accomplice, that was not the practice of our Courts, which have consistently held that it was not safe and proper to convict on such evidence without some corroboration sufficient to connect each of the accused with the offence committed. With this caution the Judge should have laid before the Jury the evidence corroborating the statement of the accomplice.⁴¹¹ The omission by a Judge to direct the Jury in his charge that although a conviction upon the uncorroborated evidence of an accomplice is valid in law, it is dangerous to convict a prisoner on such evidence alone and that they must look for corroboration of it in material particulars from independent sources in the case, is an error of law, which if it has materially prejudiced the prisoner, justifies the High Court in setting aside the verdict.⁴¹²

Where the evidence of an accomplice is uncorroborated, the correct practice requires Sessions Judges not merely to tell the Jury that it is *unusual* to convict on such evidence, but that he should also tell them that it is *unsafe*, and *contrary both to prudence and practice*

408. Elahee Buksh (1866) 5 W. R. 80 (F. B.); Ashruff Sheik (1866) 6 W. R. 91; Mohima (1871) 15 W. R. 37; Nidheeram (1872) 18 W. R. 45; Ramasami (1878) 1 M. 394; 2 Weir 799; Genu Gopal (1896) Rat. 840; Shibadas (1933) 37 C. W. N. 934; 35 Cr. L. J. 551; A. I. R. 1934 C. 114; 147 I. C. 1172.

409. Jamaldi (1923) 51 C. 160; 28 C. W. N. 536; 25 Cr. L. J. 1000; A. I. R. 1924 C. 701; 81 I. C. 712 [relying on Baskerville (1916) 2 K. B. 658]; Khotub (1866) 6 W. R. 17; Bykunt (1868) 10 W. R. 17; Shibadas (1933) 37 C. W. N. 934; 35 Cr. L. J. 551; A. I. R. 1934 C. 114; 147 I. C. 1172; Chittya Ranjan (1932) 37 C. W. N. 290; 34 Cr. L. J. 841; A. I. R. 1933 C. 509; 144 I. C. 879; Kunjan (1888) 1 M. L. J. 397, 404 (F. B.); 2 Weir 215; Maganlal (1889) 14 B. 115; Chagan (1890) 14 B. 331; Narain Das (1922) 3 L. 144; 23 Cr. L. J. 513; A. I. R. 1922 L. 1; 68 I. C. 113; Kamala v. Sital (1901) 28 C.

339, 343; 5 C. W. N. 517; Madan Guru (1918) 24 Cr. L. J. 723; 73 I. C. 963 (P); Suryya Kanta (1919) 24 C. W. N. 119; 31 C. L. J. 20; 21 Cr. L. J. 802; 58 I. C. 674; Kalwa (1926) 48 A. 409, 412; 27 Cr. L. J. 746; A. I. R. 1926 A. 377; 95 I. C. 74; Nilakanta (1912) 35 M. 247 (S. B.); 13 Cr. L. J. 305; 14 I. C. 849 [per Sankaran Nair, J.]; Abdul Wahab (1924) 47 A. 39, 43; 27 Cr. L. J. 836; A. I. R. 1925 A. 223; 95 I. C. 756.

410. Clive (1930) 22 Cr. A. R. 19.

411. Jamiruddi (1902) 29 C. 782; 6 C. W. N. 553; Jaffir Ali (1873) 19 W. R. 57, 61; Tota Singh (1922) 23 Cr. L. J. 734; 69 I. C. 462 (L).

412. Rama (1889) Rat. 466; Nawab Jan (1867) 8 W. R. 19, 23, 25; Arumuga (1888) 12 M. 196; 2 Weir 519; Muthukumarasawmi (1912) 35 M. 397, 471 (F. B.); 13 Cr. L. J. 352; 14 I. C. 896 [per Abdur Rahim, J.]; Suryya Kanta (1919) 24 C. W. N. 119; 31 C. L. J. 20; 21 Cr. L. J. 802; 58 I. C. 674.

to do so ; yet his omission to state this last portion does not amount to an error in law.⁴¹³ But the evidence must be laid before the Jury, and the Judge cannot withdraw the case from them, as a case of no evidence, or direct the Jury to acquit.⁴¹⁴

The Judge ought, in his charge, to direct the Jury that the corroboration of an accomplice or accomplices ought to be that which is derived from unimpeachable independent evidence, as distinguished from that derived from the earlier statements of the same accomplices or the statements of the other accomplices.⁴¹⁵ The evidence of pardoned accomplices taken with the statements of unpardoned co-prisoners is not sufficient by itself to warrant the conviction of those who never confessed. The value of such sworn testimony could hardly be appreciated unless it was shown that the circumstance under which these pardoned men had from the first made their statements were such as to render previous concert highly improbable.⁴¹⁶ The Judge misdirects the Jury in telling them to regard as evidence in corroboration of the approver, the statements made by some of the prisoners when examined by the Magistrate ; such statements are no legal corroboration of the tainted evidence of an approver. Further, when such statements are made in the absence of the other prisoners whom it is intended to implicate thereby, the Sessions Judge should caution the Jury against attaching any weight to them at all, except as against those who made them.⁴¹⁷ Where the only evidence against the prisoner is the statement of the co-accused taken into consideration under S. 30 of the Evidence Act, the Judge ought to direct the Jury to acquit the prisoner.⁴¹⁸

It has, however, been held in a Madras Case,⁴¹⁹ that the evidence given by a prisoner jointly charged with others, after he is convicted and sentenced on his own plea of guilty, as a witness in the subsequent trial of his co-prisoner stands on a different footing from that of an approver or unconvicted accomplice, and a Judge is therefore not wrong in law in directing

413. Ganu (1869) 6 B. H. C. R. 57 [commenting on Imam (1867) 3 B. H. C. R. 57.

414. Elahee Buksh (1866) 5 W. R. 80, 83 (F. B.) ; Godai Raout (1866) 5 W. R. 11 ; Muhammad Usuf Khan (1928) 30 Cr. L. J. 311 : A. I. R. 1929 N. 215 : 114 I. C. 457 ; Nawab Jan (1867) 8 W. R. 19, 25 ; Ramaswami (1903) 27 M. 271, 276, 288 : 14 M. L. J. 226 : 2 Weir 803 : 1 Cr. L. J. 641. *See also* Nilakanta (1912) 35 M. 247 (S. B.) : 13 Cr. L. J. 305 : 14 I. C. 849, and Muthukumarasawmi (1912) 35 M. 397 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896.

415. Genu Gopal (1896) Rat. 840 ; Dhondi (1896) Rat 840 ; Bepin (1884) 10 C. 970 ; Bykunt (1868) 10 W. R. 17 ; Mohesh (1873) 19 W. R. 16 ; Malapa (1874) 11 B. H. C. R. 196 ; *Contra* Muthukumarasawmi (1912) 35 M. 397 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896

per majority [overruling *In re Vyasa Rao* (1911) 21 M. L. J. 283 : 12 Cr. L. J. 150 : 9 I. C. 897] ; Rattan Dhanuk (1928) 8 P. 235 : 30 Cr. L. J. 137 : A. I. R. 1928 P. 630 : 113 I. C. 329.

416. Bhagya (1895) Rat. 750 ; Narain Das (1922) 3 L. 144, 172, 173 : 23 Cr. L. J. 513 : A. I. R. 1922 L. 1 : 68 I. C. 113.

417. Bepin (1884) 10 C. 970 [referring to Malapa (1874) 11 B. H. C. R. 196 ; Budhu (1876) 1 B. 475 ; Jaffir Ali (1873) 19 W. R. 57 ; Naga (1875) 23 W. R. 24] ; *In re Alagappan* (1887) 2 Weir 742 ; Kalwa (1926) 48 A. 469 : 27 Cr. L. J. 746 : A. I. R. 1926 A. 377 : 95 I. C. 74.

418. Ashootosh (1878) 4 C. 483 (F. B.) : 3 C. L. R. 270.

419. *In re Marudaimuthu* (1892) 2 Weir 520.

a Jury, at the trial of the other prisoner, that they can look to the evidence of the convicted prisoner for confirmation of the story told by the approver.

The Judge ought, in his charge, to point out the danger of convicting any one of several prisoners charged at the trial, about whose identity, as one of the persons committing the crime, the accomplice's testimony is not corroborated.⁴²⁰ The Judge should lay before the Jury the corroborating facts.⁴²¹ To tell the Jury that it was for them to consider whether the evidence of the accomplice was strongly corroborated as to the prisoner was simply to ask them to consider a question which they would not possibly understand. It is the duty of the Judge to go through the history of the crime as detailed by the accomplice, to point out any independent evidence proving facts showing that the prisoners were, or must have been, present at or cognizant of, the crime, and if such facts are proved, they would corroborate the story of the accomplice. It would not be enough that the evidence should disclose a state of facts consistent with the possibility of the truth of the accomplice's story. If the state of facts proved is equally consistent with and capable of receiving a reasonable and natural explanation on the hypothesis of the prisoner's innocence, these facts, standing alone, would be no evidence of the *truth* of the accomplice's story. Such proof would be in-sufficient as *corroborative evidence* in a criminal case where the legal presumption of innocence of every man till he is convicted has to be put in the scale against the construction which supposes the guilt of the prisoner ; though, of course, such evidence may be of great importance as a link in the chain of proof against a prisoner.⁴²² Where the Judge wholly omitted to guide the Jury as to what amounted to legal corroboration, viz, that the testimony of the approver ought to be corroborated in some material circumstances, such circumstances *connecting* and *identifying* the prisoner with the offence : *Held*, that the omission amounted to misdirection vitiating the trial.⁴²³ But the Judge, in his charge, should not state his own view of important matters of fact so positively as to leave the Jury no loop-hole for taking any other view.⁴²⁴ Direction that if the accomplice is corroborated on some points, they may believe him on the uncorroborated points, if they thought it reasonable to do so, was held correct.⁴²⁵

It is a misdirection on the part of the Judge to point out to the Jury as evidence corroborating the evidence of an accomplice, where as a matter of fact that evidence does not corroborate at all.⁴²⁶ It would be an error in summing up if a Judge, after pointing out the danger of acting upon the uncorroborated evidence of an accomplice, were to tell the Jury that the evidence of an accomplice was corroborated by a fact which did not amount to any corroboration at all.⁴²⁷ Facts which do not show the connection of the accused

420. Genu Gopal (1896) Rat. 840 ; Dhondi (1896) Rat. 840.

421. Jamiruddi (1902) 29 C. 782 : 6 C. W. N. 553.

422. Karoo (1866) 6 W. R. 44.

423. Nawab Jan (1867) 8 W. R. 19, 23.

424. Menga Budhia (1895) Rat. 748.

425. Ledu Molla (1925) 52 C. 595 : 42 C.L.J. 501 : 26 Cr. L. J. 1037 : A. I. R. 1925 C. 872 : 7 I. C. 925.

426. Nawab Jan (1867) 8 W. R. 19, 25.

427. Elahee Buksh (1866) 5 W. R. 80, 87 (F. B.). See Ram Saran (1885) 8 A. 306 : 5 A. W. N. 311 ; Mohesh (1873) 19 W. R. 16 ; Budhu

with the offence with which the accused is charged, are no corroboration in the sense in which the word is used in such cases, although they may tend to show that certain portions of what the accomplice says are true.⁴²⁸

If a Judge in his summing up treats as corroboration of accomplice's evidence what in fact is not corroboration the conviction should be quashed.⁴²⁹

In dealing with the evidence of an accomplice, it is the duty of the Judge to explain the provisions of Ss. 133 and 114 of the Evidence Act with the relevant parts of S. 4 of that Act. It is not his duty and it is not proper to tell them as a matter of law that they must not convict unless the evidence is corroborated in material particulars. But by virtue of S. 298 (2) Cr. P. C., in a proper case, he may express his own opinion that the accomplice is unworthy of credit, telling them that they are at liberty to accept or reject. He must further state what, in his judgment, are material particulars.⁴³⁰ Where the Judge failed to tell the Jury that the evidence of the receivers of the stolen properties in a trial for theft and house-breaking should be considered with caution : *Held*, that inasmuch as the receivers were in the position of abettors under S. 107 I. P. C., the omission to caution the Jury about their evidence was a material non-direction which was likely to have prejudiced the accused and that therefore a re-trial should be ordered.⁴³¹ When it is more than possible that if the Judge had clearly called the attention of the Jury to the fact that there was no corroboration of certain prosecution witnesses they might have returned a different verdict, the summing up amounts to a misdirection.⁴³² Where the facts raise sufficient suspicion that a person was an accomplice, it is necessary for the Judge to have that question put for the Jury's consideration.⁴³³ Though the uncorroborated evidence of an accomplice is admissible in law, it is a rule of practice for the Judge to warn the Jury of the danger of convicting a person on the uncorroborated testimony of an accomplice.⁴³⁴ It is the duty of the Judge to point out to the Jury the position in law affecting the evidence of an accomplice and to tell them that they may convict if they choose on his evidence alone ; but that owing to the circumstances under which the evidence is given it is very dangerous to act upon it unless they find corroborative evidence which implicated the accused. Where a Judge is sitting without a Jury he must apply the same rule by treating himself as Jury.⁴³⁵

It is a misdirection to advise a Jury to convict on the uncorroborated evidence of an accomplice or even to tell them that it was for them alone to form their opinion on

(1876) 1 B. 475 ; Baldeo (1885) 8 A. 509 ; 6 A. W. N. 176 ; Jamiruddi (1902) 29 C. 782 ; 6 C. W. N. 553 ; Bspin (1884) 10 C. 970 ; Maganlal (1889) 14 B. 115, 143 ; Rebati Mohan (1928) 56 C. 150 ; 32 C. W. N. 945 ; 30 Cr. L. J. 435 ; A. I. R. 1929 C. 57 ; 115 I. C. 258.

428. *Per* Macpherson, J. in *Nawab Jan* (1867) 8 W. R. 19, 26.

429. Phillips (1924) 18 Cr. A. R. 115.

430. Nanhak Ahir (1934) 13 P. 529 ; 35 Cr. L. J. 1104 ; A. I. R. 1934 P. 309 ; 150 I. C. 687.

431. Mavuthalayan (1934) 58 M. 86 ; 36 Cr. L. J. 633 ; A. I. R. 1934 M. 721 ; 155 I. C. 74.

432. Sita Ram (1931) 7 Luck 390 ; 33 Cr. L. J. 167 ; A. I. R. 1932 O. 23 ; 135 I. C. 392.

433. Moss (1926) 28 Cr. L. J. 278 ; A. I. R. 1927 C. 460 ; 100 I. C. 358.

434. Jarnaldi Fakir (1923) 51 C. 160 ; 28 C. W. N. 533 ; A. I. R. 1924 C. 701 ; 25 Cr. L. J. 100.

435. Shibadas (1933) 37 C. W. N. 934 ; 35 Cr. L. J. 551 ; A. I. R. 1934 C. 114 ; 147 I. C. 1172.

it, as if such evidence without corroboration might be acted on with as much safety as that of any other witness. It would amount to a misdirection to omit to give the Jury a suitable warning or tell the Jury that the approver's evidence against a particular accused has received independent corroboration when that is in fact not the case.⁴³⁶ To let the evidence of the approver go to the Jury without giving them proper warning is a misdirection. For a Judge to withdraw consideration of the guilt or innocence of the accused from the Jury by telling them that a conviction cannot be based upon the uncorroborated testimony of an approver would be no less misdirection and directly contrary to the statute. The Judge is bound to caution the Jury and to advise them that, generally speaking, the natural presumption for them to make is that the evidence of the approver is unreliable, though they are not compelled in law to act on the presumption.⁴³⁷ It is for the Judge to rule whether they should accept it or not. Where there is no corroboration worth the name of the approver's evidence and where the Judge fails to direct the Jury accordingly, his omission to do so amounts to misdirection.⁴³⁸ An approver being a criminal himself and of low character his evidence must be received with a very great deal of caution, if not suspicion. Further, it should always be kept in mind, while dealing with the evidence of an approver, that he can easily substitute an innocent person who was actually participating with him in a particular case. This danger must be guarded against in the summing up. The Judge should tell the Jury that an approver's evidence requires corroboration in material particulars tending to connect each of the accused with the offence. If the Jury were well aware of the corroboration required, the Judge's omission in directing them on that matter in the precise language does not amount to misdirection.⁴³⁹ The question how far an approver is to be believed is a matter essentially for the Jury; it is not, therefore, open to the Judge to tell the Jury that an approver is an out and out liar.⁴⁴⁰

From the aforesaid discussions the following propositions may be laid down :—

It is incumbent on the Judge to inform the Jury that an accomplice is unworthy of credit against an accused person, unless he is corroborated in material particulars in respect of that person. Failure to do this is misdirection vitiating the trial.

It is the duty of the Judge to point out to the Jury any independent evidence, if any, which goes to corroborate the evidence of the accomplice, as against the prisoner.

It is a misdirection to point out to the Jury any fact in evidence as corroboration of the testimony of an accomplice which is really no proper corroboration.

It is a misdirection to tell the Jury that the evidence of the approver has been corroborated by his own previous consistent statements.

436. Raghunath (1932) 13 P. L. J. 802 : 34 Cr. L. J. 421 : A. I. R. 1933 P. 96 : 142 I. C. 809.

437. Wajid Sheikh (1933) A. I. R. 1933 P. 500 : 147 I. C. 1160.

438. Amar Nath (1930) 32 Cr. L. J. 1049 : A. I. R. 1931 L. 406 : 133 I. C. 639.

439. Hachuni Khan (1930) 34 C. W. N. 390 : 32 Cr. L. J. 33 : A. I. R. 1930 C. 481 : 127 I. C. 767.

440. Ramsarup (1929) 9 P. 606 : 32 Cr. L. J. 72 : A. I. R. 1930 P. 513 : 128 I. C. 121.

It is a misdirection to tell the Jury that the evidence of the approver against a prisoner is corroborated by the statement of some of the other prisoners.

It is a misdirection to tell the Jury that there cannot be a conviction on the uncorroborated testimony of an accomplice.

It is not a misdirection to tell the Jury that although it is unsafe to convict an accused on the uncorroborated testimony of an accomplice, still it would be quite legal for them to convict on such testimony, if they, from the intrinsic truth in the accomplice's statements, want of motive for falsely accusing the accused or from other especial circumstances, give credit to the accomplice's statement against the accused and act upon it, though there was no corroboration at all or only very slight corroboration.

S. 114 Illustration (g), Evidence Act.

Illustration (g) to S. 114 of the Evidence Act points out that the Court may presume that evidence, which could be and is not produced, would be unfavourable to the person who withholds it.

In trials before the Court of Sessions or the High Court the Public Prosecutor has ordinarily to call all the persons entered in the calendar as witnesses for the prosecution, but he is not always bound to do so. We have discussed this matter in Chapter V of Part II, *ante*, under heading "*Is the Public Prosecutor bound to call all the witnesses appearing in the calendar as witnesses for the Crown*" and the headings following. The leading cases on the subject have been noted there.

In criminal trials, however, the presumption that may be drawn from the non-production of a witness for the prosecution does not stand on the same footing as the presumption arising from the non-production of a witness for the defence. This distinction has been well pointed out in the case of *E. v. Dhunno Kazi*.⁴⁴¹ There it was observed that if a witness for the prosecution is not called without sufficient reason the Court may properly draw an inference adverse to the prosecution, but there is no corresponding inference against the accused; the accused is merely on the defensive and owes no duty to any one but himself; he is at liberty as to whole or any part of the case against him to rely on the witnesses of the case for the prosecution or to call witnesses or to meet the charge in any other way he chooses; and no inference unfavourable to him can properly be drawn, because he takes one course rather than another.

We shall deal first with the non-production of witnesses for the prosecution and what should be the proper direction of the Judge to the Jury with reference to it.

Presumption which may arise under S. 114 (g) of the Evidence Act from non-production of witnesses should be drawn to the attention of the Jury;⁴⁴² and

441. (1881) 8 C. 121 : 10 C. L. R. 151.

442. Abdul Sheikh (1915) 17 Cr. L. J. 92 : 32 I. C. 684 (C).

they should be left to draw their own conclusions from it.⁴⁴³ The prosecution did not examine certain material witnesses named in the First Information and also in the evidence. The Judge in his summing up did not tell the Jury that they could draw an inference unfavourable to the prosecution from the omission to examine these witnesses. *Held*, that it was a material misdirection.⁴⁴⁴ It is not necessary that the Judge should direct the Jury in so many words that the omission of the prosecution to call witnesses raised a presumption under the Evidence Act, S. 114 III. (g), that their evidence should be unfavourable to the Crown, if he has pointed out that the Jury might properly draw any inference they pleased from such omission.⁴⁴⁵ Verdict was set aside in a case in which one of the grounds found in favour of the prisoner was that the Judge had omitted to point out to the Jury the absence of evidence very material to the case for the prosecution.⁴⁴⁶ A Judge's omission to draw the attention of the Jury to the failure on the part of the prosecution to put in an inquest report, when that is material for the case, is a misdirection which vitiates the conviction.⁴⁴⁷ Before the Jury can draw a presumption under S. 114 (g), they have to be satisfied that the person who, it is suggested, has been kept back, in fact knew the facts and was a willing and truthful witness and, therefore, was willing and able to give relevant evidence at the trial.⁴⁴⁸

The appellant and two other persons R and A were accused of having committed murder of a man travelling in a boat of which they were the boatmen. R was tried first and at this trial A was given a pardon and examined as a witness. The appellant was tried subsequently and the prosecution did not examine A. The Jury, by a majority, returned a verdict of guilty against the appellant who was convicted by the Sessions Judge. *Held* (as to the non-examination of A) *per Teunon, J.*—that the case of *Dhunno Kazi* (8 C. 121) is not an authority for the proposition that the prosecution is required to produce and examine such a witness, but as he was examined as an approver at the former trial of R, it would have been more satisfactory if the prosecution had at least secured his attendance and failing in this had given detailed evidence of the efforts made in that direction. *Per Shamsul Huda, J.*—That the omission to direct the attention of the Jury to the question whether the prosecution was bound to call A as a witness and whether there was sufficient explanation why the prosecution did not call him was a defect in the charge which prejudiced the accused; that in the absence of anything to show that an effort was made to ascertain his whereabouts and to produce him in Court, his absence

443. Tajali Mian (1927) 7 P. 50 : 28 Cr. L. J. 843 : A. I. R. 1928 P. 31 : 104 I. C. 459.

444. Tenaram (1920) 25 C. W. N. 142 : 33 C. L. J. 180 : 22 Cr. L. J. 475 : 61 I. C. 1003 [referring to *Dhunno Kazi* (1881) 8 C. 121, 124, 125 : 10 C. L. R. 151 ; *Ram Sahai* (1884) 10 C. 1070, 1072 ; *Ram Ranjan* (1914) 42 C. 422 : 19 C. W. N. 28 : 16 Cr. L. J. 170 : 27 I. C. 554.] ; *Hari Charan* (1925) 27

Cr. L. J. 398 : A. I. R. 1926 C. 728 : 93 I. C. 46.

445. Fanindra (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 1 I. C. 970.

446. Gunga Govind (1875) 23 W. R. 21.

447. *In re Sennimalai Goundan* (1915) 46 Cr. L. J. 717 : 30 I. C. 1005. (M).

448. *Girishchandra* (1931) 58 C. 1335 : 33 Cr. L. J. 135 : A. I. R. 1932. C. 118 : 135 I. C. 443.

from his village deposed to by one of the prosecution witnesses was not a sufficient explanation for his non-production.⁴⁴⁹

In a case of rioting the Sessions Judge in his summing up said :—"The prisoner's Muktear has alluded to the absence of the other wounded persons who formerly appeared to give evidence. To these facts you will attach what weight you please. I must, however, point out to you that what is said for the prosecution, *viz.*, that the other witnesses have been bought over, may quite possibly be true, at least in my opinion. You can judge for yourselves whether on a lapse of two years, when anger has cooled down, an injured man may or may not be likely to be bought over." *Held*, that the statement was singularly unfair to the prisoner. The statement of the Muktear employed for the prosecution was a wanton defamation of absent men who could not defend themselves, which should have been instantly and sternly checked by the Sessions Judge. There is not a particle of evidence to warrant it. The prosecutor was questioned by the Court, and admitted that some of the witnesses denied the prisoner's identity with Mohabir Singh engaged in the riot. Instead of allowing the prisoner the benefit of the admission made by the prosecutor, that some of the persons present did not think that the prisoner was Mohabir, the Sessions Judge actually adopts the wanton and unfounded assertion of the Muktear, for the prosecutor himself never said anything of the sort.⁴⁵⁰

A charge should aim at a fair and impartial presentation of facts to the Jury for their decision. Where the prosecution has omitted to call certain important witnesses, the Judge ought to caution the Jury that it is *prima-facie* the duty of the prosecution and not of the accused to call them, and that if they are not called without sufficient reasons being shown it is proper to draw an inference adverse to the prosecution.⁴⁵¹ Failure of the Judge to do so amounts to misdirection and is a good ground for setting aside the conviction.⁴⁵² Absence of explanation by the prosecution for not examining witnesses named in the First Information, should be brought to the notice of the Jury, and their attention should be drawn to the presumption arising out of such non-examination, but a mere omission to so inform the Jury is not a non-direction vitiating their verdict.⁴⁵³ The prosecution had failed to summon certain witnesses named in the First Information. The Judge said to the Jury that if they accepted the explanation of the prosecution that they were not called because their evidence was valueless they should not draw

449. Ashraf Ali (1917) 21 C. W. N. 1152 : 19 Cr. L. J. 81 : 43 I. C. 241.

450. Mohabeer Singh (1866) 6 W. R. 64.

451. Kameshwar Lal (1933) 34 Cr. L. J. 828 : A. I. R. 1933 P. 481 : 144 I. C. 872 ; Hachuni Khan (1930) 34 C. W. N. 390 : 32 Cr. L. J. 33 : A. I. R. 1930 C. 481 : 127 I. C. 767.

452. Shaikh Nabab Ali (1930) 58 C. 580 : 34 C. W. N. 1151 : 53 C. L. J. 54 : 32 Cr. L. J.

228 : A. I. R. 1930 C. 708 : 129 I. C. 99 [following Tenaram (1920) 24 C. W. N. 142 : 33 C. L. J. 180 : 22 Cr. L. J. 475 : 61 I. C. 1003 ; Fanindra (1908) 36 C. 281 : 13 C. W. N. 197 : 9 C. L. J. 199 : 9 Cr. L. J. 452 : 11 C. 970].

453. Hari Charan (1925) 27 Cr. L. J. 398 : A. I. R. 1926 C. 728 : 93 I. C. 46.

the inference under S. 114 (g), Evidence Act, and if they did not believe the same they could draw the inference. *Held*, that there was no misdirection.⁴⁵⁴ In a murder case the prosecution did not bring independent witnesses, though available, nor did it give any satisfactory explanation for the omission. The Court in charging the Jury referred to this matter and asked the Jury to give due consideration to it but failed to inform them of the presumption that in such case, had those witnesses given evidence, that evidence would have been against the prosecution : *Held*, that the direction to the Jury was insufficient and that there was a misdirection.⁴⁵⁵ Where the prosecution failed to examine a material witness and the Judge left it to the Jury to say how far it was so material as to raise in their minds a reasonable doubt as to the prosecution evidence : *Held*, that there was no misdirection.⁴⁵⁶ But the prosecution is not bound to examine all the witnesses ; and there is no misdirection if the Judge did not refer to the fact that the prosecution omitted to examine some of the witnesses.⁴⁵⁷ If a Sessions Judge considers that, after the examination a Police Constable, the evidence of an Inspector of Police is necessary, he ought not to animadvert on his absence in charging the Jury ; but he ought to intimate his opinion to the Public Prosecutor and give him an opportunity of calling that official.⁴⁵⁸

The omission by the Judge in his charge to the Jury to mention the fact of the original witnesses named in the First Information having been abandoned by the prosecution, of two of them having given evidence for the defence and of the witnesses actually examined for the prosecution being entirely new witnesses is a sufficient misdirection to justify the setting aside of the conviction.⁴⁵⁹

When only 3 out of 9 witnesses named in the First Information were called by the prosecution and the prosecution was criticised on that ground and the Assistant Sessions Judge remarked that it did not appear that they would give evidence material to the case, and that if the accused had wanted these witnesses to be produced here they could have applied to the Magistrate or to him, and he would have called them if it had been suggested to him that the witnesses were wanted. It appeared that when the informant and the Investigating-officer were in the witness box, no question were put to them on this matter. *Held*, that the learned Assistant Sessions Judge has dealt with the matter quite correctly in his charge to the Jury.⁴⁶⁰

As regards non-prosecution of witnesses for the defence, it is a proper direction for the Judge to say :—"But I tell you, and I lay it down as a matter of law that you must follow that in a criminal trial an accused person has no duty except to himself. He

454. Girish Chandra (1931) 58 C. 1335 : 33 Cr. L. J. 135 : A. I. R. 1932 C. 118 : 135 I. C. 443 ; Pachamuthu 1935 M. W. N. 363.

455. Sali Sheikh (1931) 54 C. L. J. 244 : 33 Cr. L. J. 85 : A. I. R. 1931 C. 752 : 134 I. C. 1191.

456. Krishna Maharana (1929) 9 P. 647 : 31 Cr.

L. J. 306 : A. I. R. 1929 P. 651 : 121 I. C. 477.

457. In re Muthaya Thevan (1926) 28 Cr. L. J. 307 : A. I. R. 1927 M. 475 : 100 I. C. 531.

458. Raman (1897) 21 M. 83 : 2 Weir 503.

459. Dasarath (1907) 34 C. 325 : 5 Cr. L. J. 424.

460. Hari Mahto (1935) 37 Cr. L. J. 320 : A. I. R. 1936 P. 46 : 160 I. C. 675.

is not bound to call evidence in his defence, and you can draw no inferences against him from the fact of his relying on the weakness of the prosecution and declining to call evidence for himself. The prosecution must stand or fall on its own strength.⁴⁶¹

Where the Judge thought it necessary to put the fact that no evidence was adduced by the defence prominently before the Jury, he was bound to qualify it by pointing out to the Jury that the defence was not bound to call any evidence, that they could rely on the prosecution evidence so far as it could help them and that they were entitled to the benefit of the doubt.⁴⁶²

Where a Judge told the Jury that if the Jury were of opinion that the accused had failed to establish their plea of *alibi*, then there would arise a presumption against them as to their complicity in the crime : *Held*, that there is no authority for such a statement and it amounts to a misdirection.⁴⁶³

Where the Judge told the Jury that the accused had said nothing about what had happened to the deceased and had given no explanation as to how he came by his death and this was a strong point against the accused : *Held*, per Teunon, J., that where a *prima-facie* case of circumstances making out or tending to support the charge against the accused is established and the accused withholds evidence in disproof or explanation available to him and not accessible to the prosecution, an inference unfavourable to the accused may legitimately be drawn.⁴⁶⁴

S. 118, Evidence Act.

Child Witness—Examination of.—

S. 118 of the Evidence Act enacts :—"All persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".

The above Section, therefore, embodies the general rule that the capacity of the person offered as a witness is presumed ; and to exclude a witness on the ground of mental or moral incapacity the existence of the incapacity must be made to appear.

A child witness is, therefore, a competent witness. But if the Court considers that on account of tender age he is unable to understand the questions put to him or give rational answers to those questions, it may judge him to be an incompetent witness and refuse to take his evidence. The question then arises, when this judgment should be arrived at. Should it be made before the witness is examined on the facts of the case, or can it be arrived at in the course of his examination in the case ? There is some divergence of judicial opinion on this question.

461. *Per* Adamson, C. J. in Maung (1906) 3 L. B. R. 133 : 4 Cr. L. J. 98.

462. Asfar Sheikh (1910) 15 C. W. N. 198 : 11 Cr. L. J. 557 : 8 I. C. 52.

463. Taribullah (1921) 25 C. W. N. 682 : 23 Cr. L. J. 244 : 66 I. C. 180.

464. Ashraf Ali (1917) 21 C. W. N. 1152 : 19 Cr. L. J. 81 : 43 I. C. 241, *per* Teunon, J. ; *contra per* Shamsul Huda J.

In *Sheikh Fakir v. E.*,⁴⁶⁵ it has been held that before a child of tender years is asked any questions as to the *res gestae*, the Court should test his capacity to understand the difference between truth and falsehood, and the Judge must form his opinion as to the competency of a witness before his actual examination commences ; when, however, it appears in the middle of his examination that no value should be placed on his testimony as his intelligence is not sufficiently developed, the Judge must not leave the evidence to the Jury without necessary comments and directions. So in *Dhani Ram v. E.*⁴⁶⁶ it was observed that in the case of a child of tender years produced as a witness the Court should examine it after being satisfied that the child is intellectually sufficiently developed to enable it to understand what it had seen and to afterwards inform the Court thereof. In *E. v. Hari Ramji*⁴⁶⁷ Shah, J., observed :—"It is necessary that before proceeding to examine such witness (i. e., witness of tender years) the Court should satisfy itself that the witness was competent to testify, that is, was capable of understanding the questions put to him and of giving rational answers to those questions ; and that thereafter the Court would proceed to administer an oath or affirmation as required by the Indian Oaths Act. If the witness is found to be incapable of understanding the obligations of such an oath or affirmation, he may be examined without an oath or affirmation, provided he is found to be a competent witness. These facts may be noted so that the record may show that, before taking the statement of a witness of that character, the trial Court had ascertained that the witness was a competent witness under S. 118 of the Evidence Act, and the omission to administer an oath or affirmation was due to his want of understanding the obligations of an oath." It has also been held in *Q. E. v. Lal Sahai*⁴⁶⁸ that the competency of a person to testify as a witness is a condition precedent to the administration to him of an oath or affirmation ; that the Court has to ascertain in the best way it can, whether from the extent of his intellectual capacity and understanding he is able to give a rational account of what he has seen or heard or done on a particular occasion. The Judge should for the sake of precaution, as a preliminary measure, by means of a few suitable questions, ascertain whether the intelligence of the child is such that (whether sworn or not) it is capable of giving testimony which is patent of credit ; and it is certainly desirable that something should at the commencement of the record of the evidence of the witness of this character be entered to show that such a test has been in fact made⁴⁶⁹. It is, however, not obligatory to make such a record ; and the absence of such a record at the commencement of the record of the evidence will not show that the Judge had not satisfied himself as to the capacity to testify.⁴⁷⁰ If the Court is of opinion that by reason of tender years and consequent immaturity of judgment the child is unable to understand the questions put to him or to give

465. (1906) 11 C. W. N. 51 : 4 Cr. L. J. 412 ;
Tulsi (1928) 29 Cr. L. J. 767 : A. I. R. 1928
L. 903 : 110 I. C. 799.

466. (1915) 38 A. 49 : 16 Cr. L. J. 829 : 31 I. C.
1005.

467. (1918) 20 Bom. L. R. 365 : 19 Cr. L. J. 593 :
45 I. C. 497 [following Sewa Bhogta (1874)
14 B. L. R. 294 (F. B) : 23 W. R. 12 ; Shava

(1871) 16 B. 359 and Kusha Yamaji (1903) 5
Bom L. R. 551].

468. (1888) 11A. 183 : 9 A. W. N. 5

469. Murst. Ramsakhia (1934) 36 Cr. L. J. 447 :
A. I. R. 1934 P. 651 : 153 I. C. 922 ; Panchu
(1921) 23 Cr. L. J. 233 : A. I. R. 1923 P.
91 : 66 I. C. 73.

470. Panchu (1921) 23 Cr. L. J. 233 : A. I. R.
1923 P. 91 : 66 I. C. 73,

rational answers, it ought not to examine the child at all.⁴⁷¹ It may turn out in the course of the examination that the test has been fallacious and in such a case it is always open to the Judicial Officer to say that he cannot accept the evidence.⁴⁷²

A different view, however, has been taken in *Nafar Sheikh v. E.*⁴⁷³ which has held that by S. 118 of the Evidence Act, the Legislature has not prescribed an inflexible rule of universal application to the effect that before a child of tender years is questioned the Court must by preliminary examination test his capacity to understand and to give rational answers and must form an opinion as to the competency of the witness before the actual examination commences; that the mere circumstance that the Court did not interrogate the witnesses of tender years before their examination began with a view to test their capacity, does not invalidate the trial, and that the competency of such a witness may be tested in the course of the examination. Beachcroft, J. in the above case observed: "I respectfully dissent from the dictum in *Fukir v. E.* (11 C. W. N. 51 : 4 Cr. L. J. 412) that the Judge must form his opinion as to the competency of a witness before his actual examination commences." The capacity of the child may be tested even during the course of examination of the child.⁴⁷⁴

In any case, there can be no doubt, that the capacity of a child witness to testify should be tested by the Court. It is for the Judge himself to decide as to his competency and not for the Jury, although after he has decided in favour of the competency it is for the Jury to determine the amount of credit to be given to the statements made by the witness.⁴⁷⁵ Young children are dangerous witnesses; any mistake or discrepancies in their statements are ascribed to innocence or failure to understand and undue weight is often given to what is merely a well-taught lesson. Children have good memories and no conscience. They are daily taught stories and live in a world of make-believes and so they are often become convinced that they have really seen the imaginary incident which they have been taught to relate.⁴⁷⁶ When referring to the evidence of a child witness the Judge said:—"It is for you, however, to estimate the credit of a witness but, in my opinion, to impeach the credit of a young child by seeking to contradict him by proof of a former statement is merely taking an unfair advantage of his age. I leave that matter to you". *Held*, that this charge was not correct.⁴⁷⁷ In

471. Ghulam Hussain (1930) 31 P. L. R. 612 : 32 Cr. L. J. 63 : A. I. R. 1930 L. 337 : 127 I. C. 862 [following Dhani Ram (1915) 38 A. 49 : 16 Cr. L. J. 829 : 31 I. C. 1005 and not following Nafar Sheikh (1913) 41 C. 406 : 18 C. W. N. 147 : 18 C. L. J. 582 : 14 Cr. L. J. 485 : 20 I. C. 741]; Syed Rasul (1929) 31 Cr. L. J. 114 : A. I. R. 1930 S. 129 : 120 I. C. 514.

472. Panchu (1921) 23 Cr. L. J. 233 : A. I. R. 1923 P. 91 : 66 I. C. 73.

473. (1913) 41 C. 406 : 18 C. W. N. 147 : 18 C. L. J. 582 : 14 Cr. L. J. 485 : 20 I. C. 741.

474. Syed Rasul (1929) 31 Cr. L. J. 114 : A. I. R. 1930 S. 129 : 120 I. C. 514 [relying on Dhani Ram (1915) 38 A. 49 : 16 Cr. L. J. 829 : 31 I. C. 1005, and Nafar Sheikh (1913) 41 C. 406 : 18 C. W. N. 147 : 18 C. L. J. 582 : 14 Cr. L. J. 485 : 20 I. C. 741].

475. Hosseinee (1867) 8 W. R. 60 ; Nafar Sheikh (1913) 41 C. 406 : 18 C. W. N. 147 : 18 C. L. J. 582 : 14 Cr. L. J. 485 : 20 I. C. 741.

476. Manni (1930) 6 Luck. 210 : 32 Cr. L. J. 48 : A. I. R. 1930 O. 406 : 127 I. C. 878.

477. Panchu (1930) 34 C. W. N. 1154 : 32 Cr. L. J. 190 : A. I. R. 1931 C. 178 : 128 I. C. 811.

England it has been held that apart from any rule of law there should be a caution administered to the Jury on the uncorroborated testimony of a young child.⁴⁷⁸ The competency of a witness is a question distinct from that of his credibility.⁴⁷⁹ When the lower Court refrained from examining a small boy on the ground that he was of tender years, the High Court held that, considering the importance of the witness, the Court ought not to have refrained from examining him, unless the Judge considered that the boy was prevented from understanding the questions put to him, or from giving rational answers to those questions, by reason of tender years.⁴⁸⁰

With respect to children, no precise age is fixed by law, within which they are absolutely excluded from giving evidence on the presumption that they have not sufficient understanding. Neither can any precise rule be laid down respecting the intelligence and knowledge which will render a child a competent witness. In all questions of this kind much must ever depend upon the good sense and discretion of the Judge. In practice, it is not unusual to receive the testimony of children of eight or nine years of age, when they appear to possess sufficient understanding.⁴⁸¹

Administering oath or solemn affirmation to a child witness.—

A great divergence of judicial opinion exists on the question whether S. 13 of the Oaths Act (X of 1873) applies to cases where the omission to take oath or affirmation is the result of the deliberate act of the Court. The question arises under the following circumstances. A child witness is put forward as a witness. The Judge satisfies himself as to the intellectual capacity of the witness and the child is therefore a competent witness under S. 118 of the Evidence Act. The Judge, however, finds, after questioning the child, that the child is too young to understand the nature of an oath or affirmation and the consequences attaching to a breach thereof and so he intentionally omits to administer an oath or affirmation, and after simply enjoining the child to tell the truth takes his deposition. The question then arises, whether the deposition is admissible in evidence.

S. 5 of the Oaths Act enacts that oaths or affirmations shall be made by the following persons: "(a) All witnesses, that is to say, all persons who may lawfully be examined, or give or be required to give evidence by or before any Court or person having, by law or consent of parties, authority to examine such persons, or to receive evidence." So, under the aforesaid Section an oath or affirmation should have been administered, and the question for consideration is, whether, with reference to S. 13 of the said Act, the omission or irregularity renders the child's evidence inadmissible.

The question first came, up for consideration in *Q. v. Itwarya*.⁴⁸² That was a case in which the Sessions Judge examined a little girl on simple affirmation, being of

478. *Cratchley* (1913) 9 Cr. A. R. 232. *See also*
Pitts (1912) 8 Cr. A. R. 128.

479. *Lail Sahai* (1888) 11 A. 183 : 9 A. W. N. 65.

480. *Ram Sewak* (1900) 23 A. 90 : 20 A.W.N. 211.

481. *Taylor's Evidence*, 9th Ed., Vol. II. S. 1377, P. 897.

482. (1874) 14 B. L. R. 54 : 22 W. R. 14.

opinion, from the answers given by her, that she was not aware of the responsibility of an oath. It was held by the High Court (Kemp and Birch, JJ.) that the evidence was not rendered inadmissible because the omission was knowingly made, (S. 13 causing the irregularity) and that the credibility of the evidence had been rightly put to the Jury.

On account of an unreported decision to the contrary, the question was referred to the Full Bench, whether the word "omission" in S. 13 included any omission, and was not limited to accidental or negligent omission. It was held by the Full Bench⁴⁸³ (Couch C. J., Kemp, Phear and Markby, JJ.) that the word included any omission; but Mr. Justice Jackson dissented from this view and he was of opinion that in framing S. 13 of the Oaths Act, it was intended to obviate the effect of any evasion on the part of witnesses or mistake on the part of officers of the Court, and not to give a power to Judges or Magistrates to render the whole Act, as it were, ineffectual by perversely or erroneously ordering that witnesses should not take an oath or affirmation.

The question was next raised in the Allahabad High Court before a single Judge (Mr. Justice Mahmood) who held⁴⁸⁴ that a witness, who, by reason of tender age or want of previous instruction had no conception of the obligations of an oath, whether with respect to a future life or to the punishment for perjury, could not be regarded as competent to give evidence legally admissible. He observed: "How a person who by reason of tender years is unable to comprehend either the spiritual or the legal obligations of an oath or solemn affirmation can be regarded as a competent witness to give evidence legally admissible, and to be understood to be liable to such penalties under the law, is a matter the reasons wherefor I find myself unable to conceive". On this ground he held the evidence of the child witness to be inadmissible, though he also dissented from the view of the Calcutta Full Bench on the same ground as stated by Jackson, J. In the same year the question came before two Judges (Straight and Tyrrell, JJ.) in *Q. E. v. Lal Sahai*.⁴⁸⁵ In this case, the child, aged 12 years, had stated to the Sessions Judge that he knew the difference between truth and falsehood, but did not know the consequences here or hereafter of telling lies, but he promised to tell the truth. No oath was administered to the child. It was held in that case that having regard to the language of the Oaths Act, a Court has no option, when once it has elected to take the statement of a person as evidence, but to administer to such person either an oath or affirmation, as the case may require. Straight, J., who delivered the judgement of the Court, did not approve the reasoning of Mahmood, J. He observed: "Either a person is or is not made a witness; if he is made a witness, then the law of this country requires that he should be either sworn or affirmed. The competency of such a person to be a witness is a matter for the Court to decide as a condition precedent to his being either sworn or affirmed; the credibility to be attached to his statements is another matter altogether, and that question only arises when he has been sworn or affirmed, and has given his evidence as a witness."

483. *Sewa Bhogta* (1874) 14 B. L. R. 294 (F. B.):
23 W. R. 12.

484. *Maru* (1888) 10 A. 207; 8 A. W. N. 86.

485. (1888) 11 A. 183; 9 A. W. N. 65.

As to the competency of witnesses, that is specifically and in terms declared by S. 118 of the Evidence Act, and I find in that Section no direction or intimation to a Court, which has to deal with the question whether a person should or should not be examined, that it is to enter upon inquiries as to his religious belief, or open up such a field of speculation as is involved in the query, 'what will be the consequences here or hereafter if you will not tell the truth.' In the above case the High Court did not expressly decide the question as to the effect of S. 13 of the Oaths Act, but sent for the witness and took his evidence afresh on oath.

The point incidentally arose in the Bombay High Court in the case of *Q. E. v. Shava*.⁴⁸⁶ There Jardine, J. (the other Judge, Parsons, J., expressing no opinion, as it was not necessary for the decision in that case) concurred with the conclusion of Mahmood, J., but did not agree with his broad proposition that an inability from tender years to comprehend either the spiritual or legal obligation of an oath or solemn affirmation is tantamount to intellectual incapacity and makes the child incompetent to be examined as a witness at all. He concurred with the observations of Straight, J., in the case noted above and held that the child witness ought not to have been examined as a witness until she had made the proper affirmation, but following the decision of the Calcutta Full Bench in *Q. v. Sewu Bhogta* (noted *ante*) held that the girl's evidence was admissible and could properly be placed before the Judge, the irregularity being cured by S. 13 of the Oaths Act. He pointed out, however, that such an irregularity is a serious matter; the danger is that the Judge relying on omission of any oath or affirmation may not make proper inquiry into the intelligent capacity of the child produced as a witness, or may fail to lay proper stress on the moral deficiency of a child or weak-headed person who feels no moral restraint about lying, or who may very easily become the subject of improper influences. He also observed that the credit of such a witness is further lessened when there is no knowledge of criminal punishment, nor fear of the Penal Code.

The Madras High Court considered the question in the case of *Q. E. v. Viraperumal*,⁴⁸⁷ and the Judges (Collins, C. J. and Parker J.) took different views. The learned Chief Justice was of opinion that the child's evidence is not admissible, the irregularity cannot be cured by S. 13 of the Oaths Act, as the Sessions Judge deliberately refused to administer any oath or affirmation; that there is a clear difference between acts of omission and acts of commission, and as S. 13 only mentions acts of omission it cannot be extended to acts of commission. On the other hand Parker, J. was of opinion that the evidence is admissible. He observed: "S. 13 of the Oaths Act is only one of many instances indicating the settled policy of the Indian Legislature to prevent justice being defeated by a technical irregularity. It maintains the legal obligation of a witness to speak the truth, while, at the same time, it provides against the possible failure of justice through a technical irregularity. Under S. 118 of the Evidence Act no sort of religious belief or knowledge of temporal penalties is required from a witness. All that is necessary is rational understanding and power to answer rationally; and though an oath or solemn affirmation is prescribed, the omission to take it will not relieve

486. (1891) 16 B. 359.

487. (1892) 16 M. 105 : 1 Weir 823.

the witness of the legal obligation to state the truth. It is obvious that it may be impossible for the witness to know whether the omission to affirm him is intentional or an oversight ; and if the mental perversity of the Magistrate (of which the witness may know nothing) does not destroy his legal obligation to state the truth, why should it render his evidence inadmissible, and thus defeat the ends of justice ? What could have been the object of the Legislature in maintaining the obligation to state the truth, if the statement, when made, was not to be used as evidence ? In the present case the Judge was careful to satisfy himself as to the competency of the witness under S. 118 of the Evidence Act ; and though he, for a mistaken reason, omitted to affirm him, I do not think that the evidence is thus rendered inadmissible". Parker, J., also cited an unreported decision of his Court (*E. v. Perumal*) in support of his contention.

The Full Bench of the Calcutta High Court (noted *ante*) did not consider the point whether the oath or affirmation should have been administered to a child witness, otherwise competent but unable to comprehend the meaning and significance of an oath or affirmation. The Allahabad High Court (Straight & Tyrrell, JJ.) held that oath or affirmation must be administered to such a witness and indirectly held that otherwise the evidence of such a witness would be inadmissible. That was also the view of Collins C. J. of the Madras High Court. Jardine, J., of the Bombay High Court and Parker, J., of the Madras High Court were of opinion that the oath or affirmation should have been administered to such a witness, but when it was not done advisedly by the Judge, the irregularity would be cured by S. 13 of the Oaths Act.

Mr. Greeven, A. J. C., of the Judicial Commissioner's Court of Oudh (the other Judge, Sanders A. J. C., expressing no opinion) observed ⁴⁸⁸ that the form of oath or affirmation was not always readily understood by children though their general intelligence and power of observation might be such as to entitle them to the greatest credit as witness ; that to administer oath to such a child was not only useless and undignified but it had a tendency to divert the Court from the necessity of directing the child's attention, in simple language within its power of comprehension, to its very serious obligation to speak the truth, affecting the life or liberty of the prisoner ; and that S. 5 of the Oaths Act applied only to witnesses capable of understanding the nature of the obligation imposed thereby. He accordingly held that when a person is competent to testify according to S. 118 of the Evidence Act, but is unable owing to his tender age to comprehend the nature of an oath or affirmation, S. 13 in a manner, perhaps not in accordance with the more modern precedents of drafting, relieves the Court of the necessity—not apparently contemplated in the general principle formulated in S. 5—for administering the oath or affirmation to a person to whom it is totally unintelligible.

In *Nafar Sheik v. E.*⁴⁸⁹ Mookherjee, J., seemed to be of opinion that a child witness, otherwise found to be a competent witness, should be asked first whether he under-

488. Ram Samujh (1907) 10 O. C. 337 : 7 Cr. L. J. 89.

489. (1913) 41 C. 406 : 18 C. W. N. 147 : 18 C. L. J. 582 : 14 Cr. L. J. 485 : 20 I. C. 741.

stood the nature and obligation of an oath or affirmation ; and the Judge should not assume, without such questioning, that he was of so tender an age that he could not possibly appreciate the value or significance of an oath or affirmation, and thus deliberately refrain from giving the child an opportunity to make it. Beachcroft, J., observed that the question whether a witness understands the nature and obligation of an oath or affirmation is foreign to the question of competency to testify and intellectual capacity is the only test. It was held in that case that where a girl of six years and two others of four years each were examined as witnesses without being affirmed, the Sessions Judge having assumed without investigation that the children were of tender age and they could not appreciate the value and significance of an affirmation, the child witnesses were examined in contravention of S. 6 of the Oaths Act and the Judge should not have adopted the course he did. In this case the question whether the irregularity was cured by S. 13 of the Oaths Act was left undecided ; but as the Judge intentionally omitted to affirm the children and they were examined as witnesses and he did not consider whether they were, by reason of tender years, prevented from understanding the questions put to them and from giving rational answers within the meaning of S. 118 of the Evidence Act, the conviction was set aside and a retrial ordered.

In a later Madras decision ⁴⁹⁰ the view of Parker, J., in *E. v. Viraperumal* ⁴⁹¹ (noted *ante*) was upheld and it was held, both on a construction of S. 13 of the Oaths Act and in view of the Calcutta and Bombay decisions that S. 13 applies to a case of this kind and that the evidence of the child witness, though not sworn or affirmed, is admissible. At the same time the learned Judges (Ayling and Oldfield, JJ.) pointed out that S. 5 of the Oaths Act is imperative ; and if a Court holds that a witness "may lawfully be examined or give or be required to give evidence" (in other words, is competent to testify), it is the duty of the Court to administer oath or affirmation to that person before recording his evidence.

The Allahabad High Court also in a later case ⁴⁹² has dissented from its previous decision in *Q. E. v. Maru*. ⁴⁹³ It has held that the fact that a Court has advisedly refrained from administering an oath to a witness is not sufficient by itself to render the statement of such witness inadmissible. But a Court should only examine a child of tender years as a witness after it has satisfied itself that the child is sufficiently developed intellectually to understand what it has seen and to afterwards inform the Court thereof, and if the Court is so satisfied, it is best that the Court should comply with provision of S. 6 of the Indian Oath Act in the case of a child just as in the case of any other witness. (In this case the charge being the grave one of murder, the High Court had the boy produced before it in the presence of the accused, oath was given to him and he was examined afresh).

Shah, J., of the Bombay High Court is of opinion that if the witness is found to be incapable of understanding the obligation of an oath or affirmation, he may be examined

490. Golla Chinna (1913) 38 M. 550 : 15 Cr. L. J. 161 : 22 I. C. 737.

491. (1892) 16 M. 105 : 1 Weir 823 [dissenting from Maru (1888) 10 A. 207 : 8 A. W. N. 86].

492. Dhani Ram (1915) 38 A. 49 : 16 Cr. L. J. 829 : 31 I. C. 1005. See also Sahdeo Ram (1935) 1935 A. L. J. 618 : 36 Cr. L. J. 1013 : A. I. R. 1935 A. 579 : 156 I. C. 849.

493. (1888) 10 A. 207 : 8 A. W. N. 86.

without an oath or affirmation, provided he is found to be a competent witness, and that these facts should be noted in the record; the evidence of such a witness is not inadmissible in view of the provisions contained in S. 13 of the Oaths Act.⁴⁹⁴ The other Judge, Marten, J., refrained from expressing any definite opinion on the point in view of the fact that there was other evidence in the case.

In *E. v. Shasi Bhusan*,⁴⁹⁵ the Calcutta High Court (Walmsley and Greaves, JJ.), held that the omission to administer the oath or affirmation to a witness, even if intentional, would not, under S. 13 of the Oaths Act, render the evidence of the witness inadmissible. In this case the Sessions Judge did not administer the oath or affirmation because the child appeared to him to be too young to take it. It was held by Greaves, J., that this fact alone would not make the witness one whose testimony cannot be taken into account.

The Patna High Court, after referring to the preceding cases, held that in every case where a child witness is a competent witness within the meaning of S. 118 of the Evidence Act the provisions of Ss. 5 and 6 of the Oaths Act ought to be applied; the only cases in which an oath or affirmation should not be administered are cases in which it clearly appears that the person who makes the oath or the affirmation does not understand the moral obligation attaching to an oath or affirmation or the consequences which may arise from giving false evidence or the iniquity of so doing, and in such cases it is obvious that the evidence of such a person would be practically valueless; the omission to carry out this duty, however, would not invalidate the proceedings or render inadmissible the evidence given.⁴⁹⁶

The Lahore High Court has held that the evidence of a child, otherwise competent to give evidence, is not inadmissible because it was recorded without oath or affirmation.⁴⁹⁷

From the cases noted above, it appears that all the High Courts are agreed that when a witness, though of tender years, is able to understand the questions and give rational answers, he is competent to testify. According to Allahabad and Madras High Courts before the deposition of such a witness is taken, oath or affirmation is to be administered, whether he understands the nature of the oath or affirmation or not. If, however, the Judge be of opinion that the witness is too young to understand the nature of the oath or affirmation, or if after questioning the Judge finds that the witness is unable to understand the meaning and the significance thereof, then according to the decision of the Calcutta, Bombay, Patna,

494. Hari Ramji (1918) 20 Bom. L. R. 365 : 19 Cr. L. J. 593 : 45 I. C. 497 [following Sewa Bhogta (1874) 14 B. L. R. 294 (F. B.) : 23 W. R. 12; Shava (1891) 16 B. 359 and Kusha Yamaji (1903) 5 Bom L. R. 551].
495. (1920) 24 C.W.N. 767 : 32 C.L.J. 31 : 21 Cr. L. J. Cr. L.J. 817 : 58 I.C. 817 [following Sewa Bhogta (1874) 14 B. L. R. 294 (F. B.) : 23 W. R. 12 and referring to Nando Lal v. Nistarini (1900) 27 C. 428, 440 : 4 C. W. N.

169 and Nafar Sheikh (1913) 41 C. 405 : 18 C. W. N. 147 : 18 C. L. J. 582 : 14 Cr L. J. 485 : 20 I. C. 741].

496. Fatu Santal (1921) 2 P. L. T. 288 : 22 Cr. L. J. 417 : 61 I. C. 705.

497. Hussain Khan (1923) 25 Cr. L. J. 317 : A. I. R. 1923 L. 332 : 76 I. C. 1037 [relying on Dhani Ram (1915) 38 A. 49 : 16 Cr. L. J. 829 : 31 I. C. 1005].

Lahore and Oudh High Courts no oath or affirmation need be administered to the witness, and the irregularity, if any, will be cured by S. 13 of the Oaths Act.

S. 154, Evidence Act.

Hostile witness.—

Under S. 154 of the Evidence Act, the Court may, in its discretion, permit the person who calls a witness to put any questions to him which may be put in cross-examination by the adverse party. Cross-examination has been defined to mean the examination of a witness by the adverse party (S. 137). Both the examination and the cross-examination must relate to relevant facts, but the main distinction between the two are :—1st, the scope of the cross-examination is wider and not limited to facts deposed to in the examination-in-chief ; as for instance, questions may be asked to contradict a witness by his previous statement, or to test his veracity, or to shake his credit by injuring his character ; and 2nd, leading questions may be put in cross-examination (S. 143) which cannot be put in the examination-in-chief (S. 142). No doubt permission may be granted under S. 142 to put leading questions to one's own witness, but that does not mean that the witness is allowed to be cross-examined. Permission may, however, be given under S. 154 to cross-examine one's own witness. Rankin, C. J. in the Full Bench case of *Profulla Kumar Sarkar v. E.*⁴⁹⁸ observed thus :—

“The reason why S. 154 does not say that with the permission of the Court a party may cross-examine his own witness is simply that this would in strictness be a contradiction in terms. Cross-examination means examination by the adverse party as distinct from the party who calls the witness (S. 137). That is, I think, the whole explanation of the use of the phrase ‘put any question to him which might be put in cross-examination by the adverse party.’ The second observation is that while the mere putting of a question in a leading form is not necessarily tantamount to cross-examination, there is no doubt as to the power of the Judge to give leave to put a leading question to one's own witness. This is plain from S. 142, the second part of which goes further than the English Law and requires the Judge to give permission in certain cases.” *See also* the judgment of Buckland, J., in the same case where he says : “As a practical matter S. 154 refers exclusively to cross-examination of a witness by the party calling him.”

The permission may be given by the Court in the exercise of its discretion. Under what circumstances the Court will exercise its discretion for the purpose, it would be difficult to formulate by any comprehensive rule ; that discretion has always to be exercised with caution by the Court before which the matter comes up for consideration. The Patna

498. (1931) 58 C. 1404, 1421, 1422 (F.B.) : 35 C. W. N. 731 : 53 C. L. J. 427 : 32 Cr. L. J. 768 : A. I. R. 1931 C. 401 : 131 I. C. 575 [commenting on the divergent opinions

expressed by Cuming, J. and Lort-Williams, J. in *Bikram Ali* (1929) 57 C. 801 : 50 C. L. J. 467 : 31 Cr. L. J. 610 : A. I. R. 1930 C. 139 : 124 I. C. 66.

High Court has held⁴⁹⁹ that it is not open to the prosecution to cross-examine its own witness without first declaring him hostile and getting permission from the Court. A hostile witness has been described as a witness, who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the Court,⁵⁰⁰ and a witness is considered adverse when, in the opinion of the Judge, he bears a hostile *animus* to the party calling him and not merely when his testimony contradicts his proof.⁵⁰¹ A hostile witness is one who is trying to defeat the prosecution by suppressing the truth.⁵⁰² But a witness who is unfavourable is not necessarily hostile.⁵⁰³ Unless there is something in the deposition of a witness which conflicts with the earlier statements made by him which will afford ground for thinking that he has been gained over by the defence, the prosecution is not entitled to declare him hostile.⁵⁰⁴ A witness is not necessarily hostile because in an absent-minded moment he admits the truth; before a prosecution witness can be declared hostile, there must be good ground for believing that the statement he made in favour of the defence is due to his enmity to the prosecution.⁵⁰⁵ The mere fact that at a Sessions trial a witness tells a different story from that told by him before the Magistrate does not necessarily make him hostile and consequently that may not be a sufficient ground for allowing his cross-examination, the proper inference to be drawn from the contradiction in his evidence—contradiction not in the details, but in the whole texture, of the story—is not that he is a witness hostile to this side or to that, but he is a witness who ought not to be believed unless supported by other satisfactory evidence.⁵⁰⁶

But S. 154 says nothing as to the declaring a witness hostile but provides that the Court may in its discretion permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party.⁵⁰⁷ "The Indian Evidence Act is most careful in S. 154 not to restrict the right of cross-examination even by committing itself to the word 'hostile'."⁵⁰⁸

It, therefore, seems that it is not a correct proposition to state that the prosecution must first declare its witness hostile before asking the Court's permission to cross-examine him.⁵⁰⁹

499. Jagdeo (1922) 1 P. 758 : 24 Cr. L. J. 69 : A. I. R. 1923 P. 62 : 71 I. C. 117.

500. Coles v. Coles (1866) 1 P. & D 70, 71.

501. Surendra v. Rani (1920) 47 C. 1043, 1057 : 24 C. W. N. 860 : 33 C. L. J. 34 : 59 I. C. 814.

502. Kalachand (1886) 13 C. 53.

503. Luchiram v. Radha Charan (1921) 49 C. 93, 101 : 34 C. L. J. 107 : 66 I. C. 15.

504. Parmeshwar (1926) 1926 P. 139 : 27 Cr. L. J. 657 ; A. I. R. 1926 P. 316 : 94 I. C. 705.

505. Fouzdar (1917) 3 P. L. J. 419 : 19 Cr. L. J. 241 : 44 I. C. 33.

506. Kalachand (1886) 13 C. 53 ; Nayeb Shahana (1934) 61 C. 399 : 38 C. W. N. 659 : 35

Cr. L. J. 1479 : A. I. R. 1934 C. 636 : 152 I. C. 44 ; Nga Nyein (1932) 11 R. 4 : 34 Cr. L. J. 286 : A. I. R. 1933 R. 57 : 142 I. C. 87.

507. Baikuntha v. Prasannamoyi (1922) 27 C. W. N. 797 (P. C.) : 44 M. L. J. 699 : A. I. R. 1922 P. C. 409 : 72 I. C. 286.

508. Per Rankin C. J. in Prafulla Kumar (1931) 58 C. 1404, 1424 (F. B.) : 35 C. W. N. 731 : 53 C. L. J. 427 : 32 Cr. L. J. 768 : A. I. R. 1931 C. 401 : 131 I. C. 575.

509. Mohan Banjari (1933) 30 N. L. R. 55 : 35 Cr. L. J. 577 : A. I. R. 1933 N. 384 : 147 I. C. 1122.

"The object of calling a witness is to elicit the facts, and if the facts to be elicited are such as ought to be elicited from a witness, and if this cannot be elicited without cross-examining him it would be difficult to say that the discretion was wrongly exercised" by the Court in permitting the cross-examination.⁵¹⁰ The Court has the discretion to permit the prosecution to challenge by way of cross-examination, the testimony of their own witnesses with regard to matters not related to the facts testified in examination-in-chief and which were elicited by the defence in cross-examination.⁵¹¹ Where a witness who had been examined before the Committing Magistrate was shy and speechless at the Sessions trial, the witness being a young child, the Sessions Court cannot simply transfer the statement of such a child made in the committing Magistrate's Court, to the Sessions Record. The proper course would have been to give permission to the prosecution under S. 154 of the Evidence Act to ask the witness a leading question and then to read out the evidence of the witness given before the Committing Magistrate and to have obtained an admission or a denial of its truth.⁵¹²

Whether permission should or should not be granted, is eminently one in the discretion of the trial Judge ; and his decision, except, in very exceptional circumstances is not open to appeal.⁵¹³ But the discretion should not be exercised without sufficient reason, and the reasons should be stated.⁵¹⁴ It is quite obvious that the discretion which is given to the Judges with regard to interrogating witnesses who go back on the original story which either side is informed that they are going to depose to before the Court, is in the interest of public justice. Witnesses, who do take action such as this, either do so from some interested motive or for the purpose of saving their own reputation. It may be of course, and this has always to be guarded against, that these witnesses were actually bought over. In that case they have to have their evidence very carefully tested and it can only be done by cross-examination.⁵¹⁵

When, however, the Court gives permission under S. 154 to cross-examine one's own witness and the witness is cross-examined, the question arises,—what is the consequence in law of the fact that such permission has been given. In an early case,⁵¹⁶ the contention was raised based on the English decisions in *Faulkner v. Brine*,⁵¹⁷ *Wright v. Beckett*,⁵¹⁸ and *Reg v. Ball*,⁵¹⁹ that the whole evidence has to be excluded from the consideration of the Judge or the Jury ; upon which Wilson, J. remarked that the English law at the time the last case was decided was entirely different to the law in India. But *Faulkner v. Brine*, ante

510. *Per* Buckland, J. in Prafulla Kumar (1931) 58 C. 1404, 1434 (F. B.) : 35 C. W. N. 731 : 53 C. L. J. 427 : 32 Cr. L. J. 768 : A. I. R. 1931 C. 401 : 131 I. C. 575.

511. Amritalal (1915) 42 C. 957, 1024 : 19 C. W. N. 676 : 21 C. L. J. 331 : 16 Cr. L. J. 497 : 29 I. C. 513.

512. Moti Ram (1923) 24 Cr. L. J. 904 : 75 I. C. 152 (Pesh).

513. *Rice v. Howard* (1886) 16 Q. B. D. 681 : 55 L. J. Q. B. 311 ; *Price v. Manning* (1889) 42 Ch. D. 372 : 37 W. R. 785 ; [both of which

were referred to with approval in Amritalal (1915) 42 C. 957 : 19 C. W. N. 676 ; 21 C. L. J. 331 : 16 Cr. L. J. 497 : 29 I. C. 513] ; *Nga Nyein* (1932) 11 R. 4 : 34 Cr. L. J. 286 : A. I. R. 1933 R. 57 : 142 I. C. 87.

514. *Suar Gola* (1934) 36 Cr. L. J. 262 : A. R. 1934 P. 533 : 152 I. C. 1021.

515. *Delber Mondal* (1936) 40 C. L. J. 733.

516. *Kalachand* (1886) 13 C. 53.

517. (1858) 1 F & F. 254 : 175 E. R. 715.

518. (1833) 1 M. & R. 414 : 174 E. R. 143.

519. (1839) 8 C. & P. 745 : 173 E. R. 699.

was followed by the Calcutta High Court in several later cases and it was held that when a witness was treated as hostile and cross-examined by the party calling him, this must be done to discredit the witness altogether and not to get rid of part of his testimony ; it was even held in some cases that the defence also could not rely upon his evidence at all.⁵²⁰ The Bombay High Court, on the other hand, refused to accept the view that discrediting a hostile witness on certain points amounts to discrediting the witness in *toto*.⁵²¹ This case was approved by the Patna High Court and Terrell, C. J., observed that the theory that a party having discredited his own witness is not entitled to rely upon any part of his evidence is fallacious ; the main purpose of cross-examination is to obtain admissions, and it would be ridiculous to assert that a party cross-examining a witness is therefore prevented from relying on admissions and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witness's statements are falsehoods.⁵²²

In this state of judicial decisions, the matter came up before a Full Bench of the Calcutta High Court,⁵²³ to which the following questions, amongst others, were referred for decision :—

- (1) Whether the evidence of a witness treated as 'hostile' must be rejected in whole or in part ;
- (2) Whether it must be rejected, so far as it is in favour of the party calling the witness ;
- (3) Whether it must be rejected, so far as it is in favour of the opposite party ; and
- (4) Whether the whole of the evidence, so far as it affects both parties favourably or unfavourably, must go to the Jury for what it is worth.

The Full Bench, after discussing all the Calcutta cases noted above and noticing the English cases on the subject, answered the first three questions in the negative. They answered the 4th question in the affirmative subject to the following conditions in cases where a prosecution witness goes back upon his previous statements :—

1st. If the previous statement is the deposition before the Committing Magistrate and is

520. See *Surendra v. Rani* (1920) 47 C. 1043, 1057 : 24 C. W. N. 860 : 33 C. L. J. 34 : 59 I. C. 814 ; *Satyendra* (1922) 37 C. L. J. 173 : 24 Cr. L. J. 193 : A. I. R. 1923 C. 463 : 71 I. C. 657 ; *Khijiruddin* (1925) 53 C. 372 : 42 C. L. J. 504 : 27 Cr. L. J. 266 ; A. I. R. 1926 C. 139 : 92 I. C. 442 ; *Mokbul* (1928) 56 C. 145 : 32 C. W. N. 872 : 30 Cr. L. J. 350 : A. I. R. 1928 C. 690 : 114 I. C. 793 ; *Panchanan* (1930) 57 C. 1266 : 34 C. W. N. 526 : 51 C. L. J. 203 : 31 Cr. L. J. 1207 : A. I. R. 1930 C. 276 : 127 I. C. 270 ; *Bikram Ali* (1929) 57 C. 801 : 50 C. L. J. 467 : 31 Cr. L. J. 610 : A. I. R.

1930 C. 139 : 124 I. C. 66 ; *Luchiram v. Radha Charan* (1921) 49 C. 93, 101 : 34 C. L. J. 107 : 66 I. C. 15.

521. *Jehangir Cama* (1927) 29 Bom. L. R. 996, 1005 : 28 Cr. L. J. 1012 : A. I. R. 1927 B. 501 : 106 I. C. 100 [relying on *Bradley v. Ricardo* (1831) 8 Bing 57 : 1 L. J. C. P. 36 : 131 E. R. 321].

522. *Sohrai* (1919) 9 P. 474, 484 : 31 Cr. L. J. 721 ; A. I. R. 1930 P. 247 : 124 I. C. 836.

523. *Praphulla Kumar* (1931) 58 C. 1404 (F. B.) : 35 C. W. N. 731 : 53 C. L. J. 768 : A. I. R. 1931 C. 401 : 131 I. C. 575.

put in under S. 288 Cr. P. C., so as to become evidence for all purposes, the Jury may in effect be directed to choose between the statements.

2nd. In other cases, the Jury cannot be so directed, because *prima facie* the statement of the witness is not evidence at all against the accused of the truth of the facts stated therein. The proper direction to the Jury is that before relying on the evidence given by the witness at the trial, the Jury should take into consideration the fact that he made the previous statement, but that they must not treat the previous statement as being any evidence at all against the accused of the facts therein alleged.

The Full Bench held that the proposition of law, enunciated in the 2nd condition above, is good law both under the English law and the Indian Evidence Act. The previous unsworn statement of a witness for the prosecution is not evidence against the accused of the truth of the facts stated therein save in very special circumstances, e.g., as corroboration under S. 157 of his testimony in the witness-box on the conditions therein laid down. If the previous statement was made in the presence and hearing of the accused, this fact might under S. 8 of the Evidence Act alter the position; but the true view even then is not that the statement is evidence of the truth of what it contains but that if the Jury think that the conduct, silence or answer of the prisoner at the time amounted to an acceptance of the statement or some part of it the Jury may consider that acceptance as an admission. But apart from such special cases, which attract special principles, the unsworn statement, so far as the maker in his evidence does not confirm and repeat it, cannot be used at all against the accused as proof of the truth of what it asserts. This means not merely that it is in itself insufficient proof but that it cannot be so used at all. It cannot be coupled with probabilities which suggest that the witness was more likely to tell the truth on the former occasion than in the witness-box so as to go to the Jury as part of the proof that what was then stated is true. The Court of Criminal Appeal has held that when a witness for the prosecution proves adverse and is shown to have made at other times a statement inconsistent with the present testimony, such statement is not evidence against the accused of the allegations which it contains, but it is relevant only on the credit of the witness.⁵²⁴

Rankin, C. J., who delivered the leading judgment of the Full Bench observed as follows:—"So far as English Law is concerned I believe there is no English case which has ever held or suggested that permission given by the Judge to the party calling a witness to 'cross-examine' him amounts to a declaration binding upon the Court or the Jury that the evidence which he has given or is about to give is unworthy of any credit. Such a doctrine is wholly contrary to fundamental principles—to the principle that the credibility of witnesses is a matter for the opinion of the Jury, to the principle that it is to be judged of finally at the end of the case and to the principle, which was firmly held in the first half of the nineteenth century in England, that a party could never be allowed to impeach the general credit of a witness whom he himself has called. The utility of the cross-examination was supposed to be that it was a means whereby the Court could more readily get the truth out of the witness. In the

524. White (1922) 17 Cr. A. R. 610.

case of witnesses like attesting witnesses to a Will or witnesses whose interest was obviously contrary to that of the party who called them, liberty to cross-examine was somewhat freely given without any intention of declaring in advance against the reputation of the witness. The ordinary rule that leading questions must not on material points be put by a party to his own witness has its basis in the circumstance that as the party chooses what witnesses he will call, a witness is very often anxious to assist the party on whose behalf he is called. The rule is to guard against the bias of the witness in favour of the side in support of which his evidence is sought. Where no such bias need be apprehended the rule loses much of its utility. The hostile witness is *ex hypothesi* one who cannot be led. The rule is not relaxed because the witness has already forfeited all right to credit but because his evidence will be more fully given and his credit more adequately tested by questions put in a more pointed and searching way."

The Full Bench has practically over-ruled the Calcutta cases noted above.

Part IV.

CHAPTER I.

Appeals in Cases tried by Jury.

List of Heading :—

1. Law on the subject.
2. Appeal from an order of acquittal.
3. Matters of Law.
4. Result of the appeal—where there is no point of law.
5. Whether S. 418 is limited in its scope by S. 423 (2).
6. Repugnancy in the verdict.
7. Verdict erroneous owing to Misdirection—S. 423 (2) and S. 537 (d) Cr. P. C.
8. How a summing up is to be judged.
9. Procedure to be followed when the High Court sets aside the verdict under S. 423 (2).—Order of retrial.
10. Application of S. 167 of the Evidence Act in appeals from verdicts of Jury.
11. Retrial order in appeal—whether controlled by S. 423 (2).
12. S. 439 (6), whether controlled by S. 423 (2).
13. Enhancement of sentence.
14. Reduction of sentence.
15. Jail appeal.—Subsequent appeal.

1. Law on the subject.—

Under S. 418 Cr. P. C, an appeal may lie on a matter of fact as well as a matter of law, except where the trial was by Jury, in which case the appeal shall lie on a matter of law only.

One exception has been made with respect to appeals in Jury cases, and that has been added as Sub-s. (2) of S. 418, by S.115 of Act XVIII of 1923 which is as follows:—

“Notwithstanding anything contained in Sub-s. (1) or in S. 423 Sub-s. (2), when in the case of a trial by Jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.”

The reason why similar facilities to a person sentenced to death are not mentioned here is that under Chapter XXVII of the Code, all death sentences are required to be confirmed by the High Court, and the High Court has consequently to go through all the matters, whether of law or of fact, to enable it to judge whether the sentence is to be confirmed, varied or annulled and may even make further inquiry or take additional evidence for that purpose and may also order a new trial. See Ss. 374-379 Cr. P. C.

In confirmation cases the High Court in the exercise of its jurisdiction has power to go behind the verdict of the Jury and substitute its own finding on facts for the unanimous

finding of the Jury ; but as a matter of practice the High Court will not generally allow the verdict to be attacked arbitrarily, it being necessary to show *prima facie* that the verdict is unsupported by evidence. Without attempting to lay down all the cases in which the High Court will exercise this power, it may safely be assumed that it will at any rate interfere where evidence which might have materially affected the finding has been improperly admitted or rejected, where the Jury were improperly charged or they misunderstood the trial Judge's directions or even where the proved facts were wholly insufficient to support the verdict.¹ In Death Reference Cases the powers of the High Court are not limited as they are ordinarily limited in the case of an appeal from a trial held by a Jury; it is open to the High Court to come to the conclusion that the finding of the Jury was not justified by the evidence, but the Court should not deal with the case merely on the paper-book, it should attach proper weight to the conclusions of the Judge and the Jury who had opportunities of seeing the witnesses in the box and noticing the development of the case.² In cases where the appellants have been sentenced to death they have in the High Court an appeal on matters of fact as well as of law. S. 374 read with S. 418 (2) supports this view. In disposing of a "reference under S. 374 Cr. P. C., and the appeals by persons sentenced to death, the High Court" is therefore obliged to come to its own independent conclusion as to the guilt or innocence of the accused independently of the verdict of the Jury or of the opinion of the Judge. In these cases the question of misdirection is of less importance. But though the High Court is not bound by the verdict of the Jury, it will attach the greatest possible weight to the verdict of the Jury if it answers a reasonable test. If after examining the evidence which is admissible in law the High Court finds, even without any opportunity of hearing witnesses and seeing their demeanour, that certain facts emerge from the evidence as proved beyond reasonable doubt and the decision in the case depends upon inference to be drawn from these proved facts, the High Court is not bound to order a re-trial. When, however, the evidence cannot properly be weighed by the Court without hearing witnesses and seeing their demeanour in the witness-box and the Court is not in a position to say whether the facts from which inferences are to be drawn are true or false, re-trial should be ordered. The High Court is unable to accept the broad proposition that in dealing with a reference under S. 374 and the appeal by the accused only two courses are open to it viz, either to acquit the accused or to order a re-trial.³

The restriction contained in S. 418 of appeals in Jury cases to matters of law does

1. Gul Wd. Loung (1921) 5 S. L. R. 103 (F. B.) : 23 Cr. L. J. 33 : 64 I. C. 657.
2. Panchu Shaikh (1930) 34 C.W.N. 1154 (S.B.) : 32 Cr. L. J. 190 : A. I. R. 1931 I. C. 178 : 128 I. C. 811.
3. Benoyendra (1936) 40 C. W. N. 432 : 37 Cr. L. J. 394 : A. I. R. 1936 C. 73 : 161 I. C. 74 [relying on Chatradhar (1897) 2 C. W. N. 49 ; Gul Khan (1927) 32 C. W. N. 345 : 47 C. L. J. 240 : 29 Cr. L. J. 546 : A. I. R. 1928

C. 430 : 109 I. C. 482 ; Panchu Sheikh (1930) 34 C. W. N. 1154 (S. B.) : 32 Cr. L. J. 190 : A. I. R. 1931 I. C. 178 : 128 I. C. 811 ; Ashraf Ali (1933) 37 C. W. N. 595 (S. B.) : 34 Cr. L. J. 533 : A. I. R. 1933 C. 426 : 143 I. C. 173 and distinguishing Rajab Ali Fakir (1927) 31 C. W. N. 881 : 46 C. L. J. 31 : 28 Cr. L. J. 742 : A. I. R. 1927 C. 631 : 103 I. C. 790].

not apply to references under S. 374.⁴ In *E. v. Daji Yesaba*⁵ Batchelor, J., observed :—"It appears to be the practice of the Bombay High Court that where a prisoner has been sentenced to death, even though the conviction was had on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law. ** I desire however to reserve my own opinion as to the correctness of the practice to which I have alluded, should the question of its correctness ever arise for judicial decision." In the same case Hayward, J., observed :—"In the High Court in murder cases it is always necessary to consider the evidence in support of the facts found by the Jury in order to ascertain that there has been no misdirection in the charge to the Jury and to determine whether it would or would not be proper in all the circumstances to confirm the sentence of death passed by the Sessions Judge." If the person sentenced to death chooses to file an appeal on his own behalf, no order of confirmation shall be made until such appeal is disposed of (Proviso to S. 376). By S. 374 read with S. 418 the accused (sentenced to death) have, in the High Court, what the legislature has recently described as an appeal on matters of fact as well as of law.⁶ Persons convicted of robbery by a Sessions Judge and a Jury and of murder by the Sessions Judge with assessors, appealed to the High Court against the conviction on the charge of murder. *Held*, that in coming to a conclusion as to whether the evidence justified the conviction appealed against, the verdict of the Jury should not be taken into consideration.⁷

Ordinarily, there is no appeal from any sentence or order passed by the High Court in the exercise of its original criminal jurisdiction (See Letters Patents CII. 25 and 26 of Calcutta, Madras and Bombay and the corresponding clauses of the Letters Patents of the other High Courts and S. 434 Cr. P. Code). A Full Bench may review such sentence or order on points of law reserved by the Judge or certified by the Advocate-General (See Chapter II, *post.*). In case, however, of a trial by Jury in the High Court or in the Court of Session under the special provisions of the new Chapter XXXIII of the Code of Criminal Procedure (substituted for the old Chapter by Act XII of 1923, S. 27), S. 449 in that Chapter provided appeals in such trial to the High Court on a matter of law as well as on a matter of fact, notwithstanding anything contained in Ss. 418, 423 (2) or in the Letters Patent of any High Court.⁸ The right of appeal against an order of acquittal is created by Ss. 417 and 449 ; and S. 449 in its application to appeals against acquittals merely has the effect of enlarging the scope of such appeals in certain class of cases.⁹

As regards Jury trials in Sessions Courts, they may come up before the High Court either on appeal or on reference. The order of the Sessions Judge may be either an order of

4. Rashbehari (1932) 34 Cr. L. J. 83 : A. I. R. 1932 P. 302 : 140 I. C. 846.

5. (1915) 17 Bom L. R. 1072 : 16 Cr. L. J. 818 : 31 I. C. 994.

6. Ashraf Ali (1933) 37 C. W. N. 595 (S. B.) : 34 Cr. L. J. 533 : A. I. R. 1933 C. 426 : 143 I. C. 173.

7. Sami (1890) 13 M. 426 : 1 Weir 290.

8. See e. g., Bimal Parshad (1924) 6 L. 98 : 26 Cr. L. J. 1241 : A. I. R. 1925 L. 401 : 88 I. C. 857 ; Zagriya (1925) 3 R. 220 : 26 Cr. L. J. 1341 : A. I. R. 1925 R. 239 : 89 I. C. 459.

9. Bhagirath (1934) 61 C. 991 : 38 C. W. N. 854 : 59 C. L. J. 482 : 35 Cr. L. J. 1367 : A. I. R. 1934 C. 610 : 151 I. C. 662.

acquittal or of conviction and sentence, if he agrees with the verdict of the Jury (S. 306), or an order submitting the whole case to the High Court for its decision if he disagrees with the verdict of the Jury. (S. 307).

In the case of an order of acquittal, the only aggrieved party in the eye of law is the Crown ; and hence provision has been made in S. 417 Cr. P. C., that only the Local Government may direct the Public Prosecutor to present an appeal to the High Court against the said order of acquittal.

In the case of an order of conviction passed by a Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge when such Judge passes a sentence for a term exceeding four years or any sentence of transportation, the convicted person may appeal to the High Court [Ss. 408 and 410 Cr. P. C.]. An appeal from an order of conviction by an Assistant Sessions Judge passing a lesser sentence may be heard by the Sessions Judge or the Additional Sessions Judge [Ss. 408 and 409 Cr. P. C.].

In either of these cases of appeal the provision of S. 418 applies and the appeal can be only on a matter of law, and also the provision of Sub-s. (2) of S. 423, viz., that the Appellate Court is not authorised to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him. With these should be read the further provision contained in S. 537, viz., that no sentence or order of the Court shall be reversed or altered in appeal on account of any error or irregularity in the proceedings or any misdirection in any charge to a Jury unless the misdirection has *in fact* occasioned a failure of justice.

There remains one point to be noticed. Under S. 412 Cr. P. C., where an accused person pleads guilty and is convicted by a Court of Session there can be no appeal against his conviction except as to the extent or legality of the sentence. Of course, this Section is not pertinent to the present Chapter, for we are dealing with appeals in cases tried by Jury, and a conviction on a plea of guilty can only come in under S. 271 (2) before the Jury is chosen ; so it is not a case of conviction on a trial held by the Jury. A plea of guilty under S. 271 (2) is a statement which, if accepted by the Court, amounts to a waiver of trial on the part of the accused ; it is not a confession, such as is dealt with in the Evidence Act in respect of relevancy or irrelevancy.¹⁰

When an offence, triable with the aid of assessors, was erroneously tried by a Jury, and the Judge accepted the verdict of the Jury and convicted thereon, the question arises whether an appeal from such conviction lies on matters of law only or on facts also. The answer depends on the interpretation of the words "where the trial was" by Jury in S. 418, that is to say, whether the words mean 'when the trial was by Jury *according to law*' or they mean 'where the trial was by Jury *as a matter of fact*'. If the former view is taken then an appeal lies both on law and facts, as the trial by Jury of an offence triable with the aid assessors was not in accordance with law ; if the latter view is taken, then an appeal lies on law only, for the

10. Shyama Charan (1934) 35 Cr. L. J. 1322 :
A. I. R. 1934 P. 330 : 151 I. C. 393.

said offence was, as a matter of fact, tried by a Jury. See notes under S. 269 (3) in Ch. I of Part II, *ante*. The recent case of *Ramanna v. E.*¹¹ has dissented from the earlier decision in 6 M. L. J. 14 and approved the case in 25 B. 680 and has held, that no appeal is permissible on questions of fact but the appeal lies only on questions of law. The same view has also been taken in *Dakhani v. E.*¹²

In an appeal from a conviction for offences some of which were tried by a Jury and some with the aid of assessors, it does not follow as a necessary consequence from the setting aside of the verdict in respect of the former offences that the convictions for the latter offences should also be set aside.¹³

2. Appeal from an order of acquittal.—S. 417.—

All appeals whatever are merely the creature of statutory enactments and must be affirmatively given and not presumed; the allowance of any appeal against an order of acquittal is a departure from the rule established under that system of criminal law and procedure on which the Indian system is mainly based, and the departure is in a direction unfavourable to personal liberty. Such an appeal implies a special privilege or exemption conferred on the Crown, although it is conferred, no doubt, for essentially public purposes.¹⁴

S. 417 is an enabling Section; it takes away by implication the powers of private parties, but does not affect S. 439.¹⁵ But in revision it has always been regarded as a sound rule of practice not to interfere when there is no error in law or on the face of the record, and not to interfere in cases of acquittal in which Government might have appealed under S. 417 but has not done so.¹⁶ The High Court cannot interfere in revision merely on the ground that on the facts found the law was wrongly applied, because the facts may as well have been wrongly found. The High Court must be satisfied that the acquittal was wrong altogether apart from the reasons given by the Magistrate.¹⁷

The appeal must be presented by the Public Prosecutor, not of his own motion but on the direction of the Local Government. In the case of an appeal from acquittal, where the liberty of the subject is involved, the statute must be strictly construed and full compliance with its provisions is required.¹⁸ The Legal Remembrancer is a Public Prose-

11. 1931 M. W. N. 129.

12. (1932) 55 A. 68 : 34 Cr. L. J. 441 : A. I. R. 1933 A. 128 : 142 I. C. 800.

13. *Satdeo* (1935) 1936 O. W. N. 28 : 37 Cr. L. J. 182 : A. I. R. 1936 O. 164 : 159 I. C. 919.

14. *Vajiram* (1892) 16 B. 414, *per* Telang, J.

15. *Nazimuddi* (1912) 40 C. 163, 167 : 13 Cr. L. J. 497 : 15 I. C. 641 ; *Rama Murti v. Jai Indra* (1933) 10 O. W. N. 345 : 34 Cr. L. J. 661 : A. I. R. 1933 O. 257 : 143 I. C. 852.

16. *Faujdar v. Kasi* (1914) 42 C. 612 : 19 C. W. N. 184 : 21 C. L. J. 53 : 16 Cr. L. J. 122 : 27 I. C. 186 by majority, *contra per* Teunon J ; *In re*

Sinnu Gounden (1914) 38 M. 1028 : 15 Cr. L. J. 236 : 23 I. C. 188 [referring to *Rangasami v. Narasimhulu* (1885) 7 M. 213 : 2 Weir 477 ; *Miyaji Ahmed* (1879) 3 B. 150] ; *Ditto* (1928) 30 Cr. L. J. 251 : A. I. R. 1928 S. 176 : 114 I. C. 110 ; *Dogar v. Budh* (1932) 34 Cr. L. J. 718 : A. I. R. 1933 L. 323 : 144 I. C. 289 ; *Ganpat* (1933) 29 N. L. R. 365 : 35 Cr. L. J. 28 : A. I. R. 1933 N. 259 : 146 I. C. 332.

17. *Roshan Lall* (1936) 40 C. W. N. 931.

18. *Gaya Prosad* (1913) 41 C. 425, 432 : 18 C. W. N. 279 : 18 C. L. J. 519 : 15 Cr. L. J. 46 : 22 I. C. 190.

cutor, and a Counsel instructed by him may present an appeal directed by the Local Government. [See Ss. 4 (t) and 492, Cr. P. C., and notes under S. 270 in Part II, Ch. I, *ante*.] If a District Magistrate be of opinion that there should be an appeal against an order of acquittal, he can only place the materials before the Legal Remembrancer and request him to advise the Local Government to appeal.¹⁹ "It would be, in my opinion, nothing less than a scandal if a Public Prosecutor in a Muffasil Sessions Court could in effect withdraw from the prosecution on a serious charge of murder and ask only for conviction on a minor charge of culpable homicide, and then another Officer representing the Crown (Public Prosecutor of Madras) could come to this Court and ask for conviction on a more serious charge".²⁰

The law by limiting the right of appeal against judgments of acquittal to the Local Government prevents personal vindictiveness from seeking to call in question judgments of acquittal by way of appeal, and evidently intends that such interference shall take place only in cases where there has been a miscarriage of justice so grave as would induce the Local Government to move in the matter. It is a most salutary principle quite as necessary to the well-being of society as the repression and punishment of crime, that interference with judgments of acquittal should take place only in cases where there has been a miscarriage of justice of a grave nature.²¹ The provisions of S. 418 (1) apply to a Government appeal under S. 417.²²

An appeal from acquittal may lie on the ground of misdirection and a misunderstanding of the law,²³ or irregularity in the proceedings²⁴ or improper admission of evidence.²⁵

There is no distinction in the Code between the right of Local Government to appeal against an acquittal and the right of a convicted accused to appeal against a conviction, both being governed by the same rules and being subject to the same limitations.²⁶ There is no distinction between the mode of procedure and the principles upon which both classes of appeals are to be decided.²⁷ In both cases the appellant has to show that there

19. See *Hrishikesh v. Abadhaut* (1916) 44 C. 703 : 21 C.W.N. 250 : 18 Cr. L.J. 309 : 38 I. C. 421 ; *Dito* (1928) 30 Cr. L. J. 251 : A. I. R. 1928 S. 176 : 114 I. C. 110.

20. *Per Rielly J. in Satyam* 1931 M. W. N. 873.

21. *Karuna* (1894) 22 C. 164, 170. See also *Judoonath* (1877) 2 C. 273, 277.

22. *Tehri* (1935) 1935 O. W. N. 1153 : 36 Cr. L. J. 1467 : A. I. R. 1936 O. 108 : 158 I. C. 913 ; *Parmeshur* (1884) 10 C. 1029.

23. *Bhairab* (1898) 2 C. W. N. 702, 709 ; *Bonigiri* (1908) 32 M. 179 : 9 Cr. L. J. 567 : 2 I. C. 307 ; *Smither* (1902) 26 M. 1, 8 : 2 Weir 521 ; *Raman* (1897) 21 M. 83 : 2 Weir 503 ; *Gangia* (1898) 23 B. 316.

24. *Abdul Hameed* (1912) 36 M. 583, 587 : 15 Cr. L. J. 197 : 22 I. C. 981.

25. *In re Dakshinamurthy* (1901) 2 Weir 517.

26. *Sheo Swarup* (1934) 61 I. A. 398 : 39 C. W. N. 15 (P. C.) : 60 C. L. J. 276 : 36 Bom. L. R. 1185 : 56 A. 645 : 67 M. L. J. 664 : 15 P. L. T. 607 : 36 Cr. L. J. 786 : A. I. R. 1934 P. C. 227 : 151 I. C. 322 ; *In re Sinnu Gounden* (1914) 38 M. 1028 : 15 Cr. L. J. 236 : 23 I. C. 188.

27. *Bibhuti* (1890) 17 C. 485 ; *Bhai Khan* (1930) 32 Cr. L. J. 485 : A. I. R. 1931 L. 18 : 130 I. C. 324.

does exist some good and strong ground apparent upon the record for interfering with the deliberate determination by a Judge who has had all the evidence before him, and has arrived at the determination with that great advantage in his favour.²⁸ But sound principles of Criminal Jurisprudence require that the indications of error in a judgment of acquittal ought to be more clear or more palpable in order to justify its being set aside.²⁹ The above and other cases of many of the High Courts show that a stronger ground is required for setting aside an order of acquittal passed by a Judge than an order of conviction, the reason being that an accused is presumed innocent unless his guilt is conclusively proved. It may be inferred, therefore, that a verdict of acquittal of a Jury will not be interfered with in appeal unless it is first established that it has been influenced by misdirection and then unless it is manifestly wrong on evidence. Thus it has been held that, in case of Jury trials, where the High Court is not prepared to hold that the Jury's verdict was due to misdirection in the charge and that apart from this, they would not have come to the same conclusions, the verdict of acquittal will not be disturbed.³⁰ The High Court, on setting aside a verdict of acquittal, is not bound in all cases to order a retrial; it can go into the evidence and convict the accused if there is sufficient evidence.³¹ Where there is evidence in a case to establish the guilt of the accused but there are also circumstances which throw some doubt on the guilt of the accused and the Jury returns a verdict of not guilty, the High Court will not be justified in interfering with the verdict and converting an acquittal into a conviction, as the verdict cannot be held to be perverse or unreasonable³² or based on obvious error of procedure.³³ Ordinarily, the Courts refrain from passing a capital sentence on a person who is convicted on an appeal against acquittal; but where the accused was a party to an attack of a particularly ferocious nature and acted in a high-handed manner and with unusual cruelty in assaulting

28. *Prag Dat* (1898) 20 A. 459 : 18 A. W. N. 117 [followed in *Ram Adhin* (1931) A. I. R. 1931 A. 439].

29. *Ramzan* (1931) 32 Cr. L. J. 1130 : A. I. R. 1932 L. 12 : 134 I. C. 112 ; *Bhai Khan* (1930) 32 Cr. L. J. 485 : A. I. R. 1931 L. 18 : 130 I. C. 324 ; *Baldeo* (1931) 1931 A. L. J. 1002 : 32 Cr. L. J. 1073 : A. I. R. 1931 A. 712 : 133 I. C. 795 ; *Maung Tun* (1930) 8 R. 671 : 32 Cr. L. J. 929 : A. I. R. 1931 R. 86 : 132 I. C. 547 ; *Ghafoor Khan* (1930) 8 O. W. N. 101 : 32 Cr. L. J. 694 : A. I. R. 1931 O. 116 : 131 I. C. 436 ; *Ramudu* (1931) 1931 M. W. N. 729 ; *Sanjeeva* (1931) 1931 M. W. N. 105 ; *Muzaffar* (1931) 32 Cr. L. J. 1079 : A. I. R. 1931 L. 465 : 133 I. C. 865 ; *Maqbool* (1931) 7 Luck 511 : 33 Cr. L. J. 920 : A. I. R. 1932 O. 317 : 139 I. C. 751 ; *Rai Singh-Narain* (1933) 35 Cr. L. J. 137 : A. I. R. 1933 L. 871 : 146 I. C. 665 ; *Sheo Swarup* (1934) 61 I. A. 398 : 39 C. W. N. 15 (P. C.) : 60 C. L. J. 276 : 36 B. M. L. R. 1185 : 56 A. 645 : 6

M. L. J. 664 : 15 P. L. T. 607 : 36 Cr. L. J. 786 : A. I. R. 1934 P. C. 227 : 151 I. C. 322 ; *Sheo Janak* (1933) 56 A. 353 (F. B.) : 35 Cr. L. J. 364 : A. I. R. 1934 A. 27 : 147 I. C. 238 ; *Bhuro* (1934) 35 Cr. L. J. 1142 : A. I. R. 1934 S. 84 : 150 I. C. 726.

30. *Shyam Sundar* (1921) 26 C. W. N. 558 : 24 Cr. L. J. 143 : A. I. R. 1922 C. 106 : 71 I. C. 367.

31. *Saran* (1926) 21 S. L. R. 356 : 28 Cr. L. J. 66 : A. I. R. 1927 S. 104 : 99 I. C. 98 [not following *Wafadar Khan* (1894) 21 C. 955] ; *Santiram* (1930) 58 C. 96 : 32 Cr. L. J. 10 : A. I. R. 1930 C. 370 : 127 I. C. 657.

32. *Shaukat* (1927) 28 Cr. L. J. 895 : A. I. R. 1927 O. 607 : 104 I. C. 911. See also *Smither* (1902) 26 M. 1 : 2 Weir 521.

33. *Lakshamma* (1929) 59 M. L. J. 520 : 31 Cr. L. J. 897 : A. I. R. 1930 M. 704 : 125 I. C. 558 [relying on *Robinson* (1894) 16 A. 212 : 14 A. W. N. 49 ; *Narayana* (1915) 16 Cr. L. J. 529 : 29 I. C. 657 (M)].

the opposite party consisting of the deceased and the latter have not been proved to have given any provocation, he may be sentenced to death.³⁴

In an appeal against an acquittal on a charge under S. 302. I. P. C. passed by the Sessions Judge trying with the aid of assessors it has been held that it is open to the appellate Court, while upholding the order of acquittal, to convict the accused of an offence under S. 193 I. P. C. even though the accused was not charged with that offence in the trial and the opinion of the assessors was not taken on that matter.³⁵ It was, however, observed by Ranade J. in *Q. E. v. Kari Gowda*.³⁶ that the High Court, exercising its jurisdiction in appeal against matters of acquittal, should confine its exercise to the particular acquittal complained of by Government. This view of Ranade, J. was not followed in the other case. A question may arise whether in a trial held by a Jury, when an appeal from an acquittal is preferred, the High Court can convict only on the charge on which the acquittal was made or may also convict on the evidence on lesser charges.

Where there has been a verdict of a Jury acquitting the prisoners of certain charges and that verdict is not impugned by way of appeal by the Crown, the prisoners should not again be put in peril for the same offences when a retrial is ordered in the appeal from conviction on some other charges which were tried by the Sessions Judge with the aid of the jurors as assessors.³⁷ (See notes under Heading "*Retrial order in appeal, whether opens up the whole case,*" post). In one case it was held that, where an accused person was acquitted of a graver charge but convicted of a lesser charge on the same facts and the accused appealed and the appeal was decided by the High Court, the Local Government could not file an appeal against acquittal on the graver charge thereafter, as there had been pronouncement by that Court which was final under S. 430; if the Local Government wanted to file an appeal, it should have done so before the final disposal of the appeal of the accused, when the two appeals could then be heard together; but the Local Government can apply for enhancement of sentence under S. 439 of the Code.³⁸ This case has subsequently been dissented from, by the majority of the Judges in *Mohammadigul v. E.*³⁹

3. Matters of law :—

The considerations governing the appeal from a trial held with the aid of assessors differ greatly from those governing an appeal from a trial by a Jury. In the latter case the appeal is restricted by the provisions of Ss. 423 (2) and 537 Cr. P. C., whereas

34. Niamat Khan (1930) 31 P. L. R. 411 : 32 Cr. L. J. 51 : A. I. R. 1930 L. 409 : 127 I. C. 850.

35. Ismail Khadirsab (1928) 52 B. 358 : 29 Cr. L. J. 433 : A. I. R. 1928 B. 130 : 108 I. C. 501 [applying Begu (1925) 52 I. A. 191 : 30 C. W. N. 581 (P. C.) : 41 C. L. J. 437 : 27 Bom. L. R. 707 : 48 M. L. J. 643 : 23 A. L. J. 636 : 6 L. 226 : 26 Cr. L. J. 1059 :

A. I. R. 1925 (P. C.) 130 : 88 I. C. 3].

36. (1894) 19 B. 51.

37. Abdul Hamid (1926) 6 P. 208 : 27 Cr. L. J. 1100 : A. I. R. 1927 P. 13 : 97 I. C. 364.

38. Modkia (1931) 33 Cr. L. J. 728 : A. I. R. 1932 N. 73 : 139 I. C. 63.

39. (1932) 28 N. L. R. 233 (F. B.) : 33 Cr. L. J. 849 : A. I. R. 1932 N. 121 : 140 I. C. 49.

in the former case the whole case is before the Appellate Court.⁴⁰ In every case of trial by Jury and especially in murder cases, it is imperative that the High Court on appeal should be satisfied that the Judge's charge to the Jury was adequate.⁴¹

An appeal in the case of a trial held by a Jury, whether from an order of acquittal or conviction, shall lie on a matter of law, except in the case provided for in Sub-s. (2) of S. 418 Cr. P. C., i., e., except in the case where a sentence of death has been passed on one of the accused, in which case the appeals of the other accused shall lie on a matter of law as well as of fact. Matters of law are the exclusive province of the Judge and he is to decide all questions arising thereon. Matters of fact are the exclusive province of the Jury and they are to decide all questions arising thereon. Law has made the Jury the sole arbiter of facts and no Court can question their findings on them. Law has also made the Judge the sole arbiter of the questions of law, and as between him and the Jury, the Jury are bound by his decisions on them, but not the appellate Court. No appeal, therefore, lies on matters of fact. The respective duties of the Judge and the Jury are enumerated in Ss. 298 and 299 Cr. P. C., and it can be gathered from them what are matters of law and what are matters of fact.

The following are some instances of matters of law :—

- (1) Illegality of the trial.
- (2) Errors of procedure.
- (3) Improper admission of evidence.
- (4) Improper exclusion of evidence.
- (5) Want of legal evidence.
- (6) Wrong inference as to the effect of proved facts.
- (7) Severity of the sentence.

Besides the matters of law, as above enumerated, there may other matters of law arising out of the improper discharge by the Judge of the duty cast upon him by S. 297 Cr. P. Code, in summing up the evidence and laying down the law while charging the Jury. The following, amongst others, therefore, are matters of law :—

- (1) Misdirection on facts.
- (2) Non-direction on material particulars.
- (3) Want of accuracy in stating the effect of evidence.
- (4) Omission on the part of the Judge to put to the Jury very important evidence in favour of the accused.
- (5) Directing the Jury to consider a piece of inadmissible evidence.
- (6) Misdirection on a question of law.

40. Musst Champa (1928) 29 Cr. L. J. 325 : A. I. R. 1928 P. 326 : 108 I. C. 81.

41. Nagendra (1929) 57 C. 740 : 34 C. W. N. 164 : 31 Cr. L. J. 673 : A. I. R. 1929 C. 742 : 124 I. C. 492.

These errors of law properly go by the term 'misdirection' or 'misdirection in the charge'. We shall see later on that errors in procedure, illegal admission or rejection of evidence and other errors are also held to be misdirection *in effect*.

4. Result of the appeal—where there is no point of law.—

Where there is no error of law or procedure, no misdirection, no material non-direction, or no misunderstanding of the law by the Jury, the appeal becomes infructuous, and the verdict stands if there is some evidence, however weak, to go to the Jury.⁴² As regards the weakness of the evidence, the following remarks of Jenkins, C. J., in *E. v. Upendra*⁴³ should be noticed :—"We have heard much of a scintilla of evidence and its paralyzing effect on the power of the Judge to assist the Jury ; that is an argument that might possibly have possessed some force in the early part of the last century. But the scintilla theory is now exploded. It is not enough to say that there was some evidence. A scintilla of evidence clearly would not justify the Judge in leaving the case to the Jury. There must be evidence on which they might reasonably and properly conclude the fact to be established [*Ryder v. Wombwell* (1869) 4 Ex. 32, 38]. This case was quoted with approval in *Metropolitan Ry. Co. v. Jackson* (1877) 3 A. C. 193, 207, where Lord Blackburn said : "It is for the Jury to say whether and how far the evidence is to be believed. And if the facts are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn. But it is for the Judge to determine, subject to review, as a matter of law, whether from those facts that further inference may legitimately be drawn. It is true that these remarks were made in a Civil case, but they are of universal application." Where the verdict of the Jury is absolutely against the weight of evidence on the record and is manifestly perverse, it has been held, in one case, that it must be set aside.⁴⁴

The appeal Court has no power to interfere with the findings of fact of the Jury, such as the guilty knowledge of the accused ;⁴⁵ the finger-print being the finger-print of the accused, there being circumstantial evidence about it ;⁴⁶ the credibility of an uncorroborated accomplice (though warned by the Judge.)⁴⁷ A Court of appeal would not be justified in disturbing the finding of a Judge or of a Jury on a simple issue of fact

42. Choonee (1866) 5 W. R. 13 ; Chinna Tevan (1890) 14 M. 36 : 2 Weir 390 ; Bhairab (1898) 2 C. W. N. 702, 709, 718 ; Rashidazzaman (1911) 15 C. W. N. 434 : 12 Cr. L. J. 193 : 10 I. C. 684 ; Rutton (1871) 16 W. R. 19.

43. (1914) 19 C. W. N. 653, 663 (F.B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 133. See the comment on this dictum of Jenkins, C. J. in *Ramchariter* (1927) 7 P. 15 : 28 Cr. L. J. 692 A. I. R. 1927 P. 370 : 103 I. C. 548. As an illustration of there being no more than a scintilla of evidence, see the case of

Basanta (1926) 44 C. L. J. 317 : 28 Cr. L. J. 108 : 99 I. C. 236.

44. Abdul Rahim (1934) 11 O. W. N. 905 : 35 Cr. L. J. 1130 : A. I. R. 1934 O. 399 : 150 I. C. 845.

45. Shuruffooddeen (1870) 13 W. R. 26.

46. Mohini (1918) 46 C. 635 : 21 Cr. L. J. 8 : 54 I. C. 56 ; Kishori Kishore (1935) 39 C. W. N. 986 : 36 Cr. L. J. 921 : A. I. R. 1935 C. 308 : 156 I. C. 396.

47. Chagan (1890) 14 B. 331 ; Jaffir Ali (1873) 19 W. R. 57, 62 ; Nidheeram (1872) 18 W. R. 45.

unless the verdict arrived at seems to be opposed to the entire weight of evidence.⁴⁸ Matter of value of the evidence is not a question of law.⁴⁹

Non-production of evidence which existed but has not been produced by the prosecution, is not a sufficient ground for setting aside a verdict of acquittal.⁵⁰

Where the Jury, inspite of the direction of the Judge, found a verdict which showed that they disbelieved the evidence for the prosecution in certain parts as to which they thought the witnesses were committing perjury, but they accepted that evidence in other parts, and convicted one of the prisoners upon it, and though the course thus taken by the Jury was unsafe and possibly led to injustice, the High Court was powerless to interfere, because the Code does not give it power to interfere with the verdict of a Jury in cases where there is evidence to go before them.⁵¹ Where the evidence was not perhaps such as would commend itself to minds professionally trained to weigh testimony, for the High Court to express any opinion on its weight would be to usurp the functions of the Jury ; it had only to see that there had been no error of law in the proceedings and no misdirection to the Jury.⁵² Where there is no point of law or misdirection, the only course in case of a verdict based against the weight of evidence or on doubtful evidence is to apply to the Government for relief.⁵³ In one such case the High Court directed a copy of its judgment to be sent to the Local Government for action.⁵⁴ The verdict of the Jury cannot be set aside on the mere ground that there has been a miscarriage of justice. To entitle the Court to interfere it must further be established that the failure of justice was the result of a misdirection of the Judge in his charge to the Jury. A non-direction is not a misdirection unless the Jury has been misled or unless the non-direction is of primary importance.⁵⁵ Miscarriage of justice through misdirection means that there must be a reasonable ground for apprehending that the misdirection may have affected the Jury's verdict.⁵⁶

The mere fact that the conviction of the accused would be a miscarriage of justice is not a sufficient ground for the interference of the verdict of the Jury. The appellants must establish also that such failure of justice was the result of the misdirection of the Judge in his charge to the Jury.⁵⁷

5. Whether S. 418 is limited in its scope by S. 423 (2).—

As has been noticed before, apart from misdirection, non-direction or misunderstanding of the law by the Jury, there may be other points of law on which an appeal from the verdict of a Jury may lie. In such an appeal, S. 423 (2) has no application. That sub-section

48. Dinabandhu (1929) 31 Cr. L. J. 737 : A. I. R. 1930 C. 199 : 124 I. C. 818.

49. Gopaul Doss (1865) 2 W. R. 5.

50. In re Sheikh Tenoo (1871) 15 W. R. 11.

51. Jaspath (1886) 14 C. 164.

52. Rashidazzaman (1911) 15 C. W. N. 434 : 12 Cr. L. J. 193 : 10 I. C. 684.

53. Nidheeram (1872) 18 W. R. 45.

54. Ramchariter (1927) 7 P. 15 : 28 Cr. L. J. 692 : A. I. R. 1927 P. 370 : 103 I. C. 548.

55. Musst. Champa (1928) 29 Cr. L. J. 325 : A. I. R. 1928 P. 326 : 108 I. C. 81.

56. Jagmohan (1929) 52 A. 207 : 30 Cr. L. J. 1146 : A. I. R. 1930 A. 28 : 120 I. C. 114.

57. Musst. Champa (1928) 29 Cr. L. J. 325 : A. I. R. 1928 P. 326 : 108 I. C. 81.

applies where it becomes necessary to consider whether the verdict of a Jury was erroneous owing to a misdirection by the Judge. It does not narrow down the scope of S. 418 which allows an appeal in a Jury trial on a question of law.⁶⁸ Thus, where there has been no trial in fact, owing to the fact that the trial which was held was illegal (4 charges of falsification of 4 different documents) the trial must be set aside for that reason only and no question arises as regards any misdirection affecting the Jury's verdict.⁶⁹ In the above case instances were cited where the trial was held to be a nullity, though tried by a Jury :—(1) *E. v. Booth*⁶⁰ (in which the trial was by a Jury of 7 persons, when it should have been by 5 persons;) (2) *Brojendra v. K. E.*⁶¹ (in which the jurors were not selected by lot as required by S. 276 Cr. P. Code); (3) *Bradshaw v. E.*⁶² (which held similarly that violation of the imperative procedure laid down in S. 276 cannot be cured by S. 537); (4) *K. E. v. Narain*⁶³ (where one of the jurors was discharged after examination of some of the prosecution witnesses, and the trial was not commenced afresh with the new juror selected in his place); and (5) *Lyme v. Cr.*⁶⁴ (where the verdict was irregularly taken twice). Where the trial by Jury was illegal and without jurisdiction, S. 423 (2) would not apply, there being no verdict to consider.⁶⁵ Six persons were jointly tried; four were charged with kidnapping and abduction and the fifth for abduction only as mentioned in S. 366 I. P. C.; the sixth accused was jointly tried with the other five for the offence under S. 368 I. P. C. *Held*, that a joint trial of this kind was illegal and could not but have prejudiced the accused.⁶⁶ Where the verdict of the Jury was arrived at by casting lots, the verdict is illegal and must be set aside.⁶⁷ Where in a trial some of the accused were acquitted and some convicted and it was found that the foreman was subsequently convicted of having taken a bribe in connection with the same trial: *Held*, that the verdict of the Jury cannot be sustained and the conviction was liable to be set aside.⁶⁸ Evidence was admissible even after verdict to establish the incompetence of a juror arising from his inability to understand the proceedings and the result of the trial having been a clear miscarriage of justice the convictions and sentences must be set aside.⁶⁹

A trial may also be illegal on the ground of want of sanction as required by S. 195 Cr. P. C., for it cannot now be cured by S. 537, as Cl (b) of that Section of the Code has been

58. *Fitzmaurice* (1926) 27 Cr. L. J. 793; A. I. R. 1926 L. 193; 95 I. C. 393.

59. *Ibid.*

60. (1903) 26 A. 211. *See also* Benozir Ahmad (1930) 34 C. W. N. 735; 51 C. L. J. 578; A. I. R. 1930 C. 716.

61. (1902) 7 C. W. N. 188.

62. (1911) 33 A. 385; 8 A. L. J. 182; 12 Cr. L. J. 46; 9 I. C. 278. *See also* Makbul (1911) 12 Cr. L. J. 537; 12 I. C. 513 (O).

63. (1914) 36 A. 481; 12 A. L. J. 802; 15 Cr. L. J. 538; 24 I. C. 946.

64. (1923) 4 L. 382; 25 Cr. L. J. 377; A. I. R. 1924 L. 17; 77 I. C. 425.

65. Abdul Hamid (1926) 6 P. 208; 27 Cr. L. J. 1100; A. I. R. 1927 P. 13; 97 I. C. 364.

66. Mozam Dafadar (1933) 34 Cr. L. J. 682; A. I. R. 1933 C. 563; 144 I. C. 93.

67. Hara Kumar (1913) 40 C. 693; 17 C. W. N. 787; 14 Cr. L. J. 392; 20 I. C. 216.

68. Hafez Molla (1933) 60 C. 751; 34 Cr. L. J. 1072; A. I. R. 1933 C. 639; 145 I. C. 816.

69. Ras Behari (1933) 12 P. 811 (P. C.); 38 C. W. N. 11; 58 C. L. J. 300; 35 Bom. L. R. 1087; 65 M. L. J. 513; 1933 A. L. J. 893; 34 Cr. L. J. 843; A. I. R. 1933 P. C. 208; 144 I. C. 911.

repealed by Act XVIII of 1923, S. 148. So a question may arise whether a verdict arrived at such a trial becomes infructuous, though no question of misdirection or misunderstanding of the law by the Jury arises. Where, however, in a criminal trial no objection was taken on the ground of S. 196-A Sub-s. (2) at any stage of the inquiry or trial, the verdict of the Jury and a conviction based thereon cannot be held to be illegal merely because the previous consent of the Local Government had not been taken before the prosecution started.⁷⁰

6. Repugnancy in the verdict.—may also be a ground for setting aside a verdict though there might not be any misdirection. Thus, in cases of indictment for conspiracy, when two people only are indicted as the conspirators and are tried together, either both must be convicted or both acquitted, and where three persons were charged with having entered into a conspiracy, and two of them are acquitted, the third person could not be convicted of conspiracy, whether the conviction be upon the verdict of the Jury or upon his own confession.⁷¹ It is based on the rule of procedure that repugnancy on the face of the record is a ground for annulling a conviction.⁷² But it has also been held that the repugnancy in the verdict of a Jury in India is not in itself sufficient to justify the questioning of a conviction and the technicalities which are borrowed from the English Law and founded on ideas as to the sacred character of a verdict of the Jury whose findings of fact are unknown, cannot be imported so as to give to verdicts of juries in India a character which by the express provisions of law does not attach to them.⁷³ But if a rule recognised under the English Law embodied a principle of natural or substantial justice, and the Code did not militate against its application, the powers under S. 423(2) would be wide enough to allow its adoption.⁷⁴ In an early case there were two charges against a prisoner: one under S. 196 and the other under S. 471 I. P. C. The prisoner was found guilty by the Jury under the former and not guilty under the latter charge. *Held per Glover, J.*:—"The second ground of appeal appears to me altogether untenable; doubtless, the evidence would have sufficed to have convicted on either count, for the prisoner used the false laggits as true, besides swearing to their authenticity; but there was nothing illegal in the Jury convicting on the one and acquitting on the other. Indeed, it would appear that the second finding of 'not guilty' under S. 471 was a *proforma* one, the real charge against the prisoner being comprehended in S. 196, under which the Jury had already found him guilty. There was no necessity for the second count at all, but,

70. Hanif (1932) 34 Cr. L. J. 56; A. I. R. 1932 C. 786; 142 I. C. 723 [distinguishing *Nibaran* (1929) 57 C. 99; 33 C. W. N. 834; 31 Cr. L. J. 995; A. I. R. 1929 C. 754; 126 I. C. 272.

71. Gulab Singh (1916) 14 A. L. J. 688; 17 Cr. L. J. 431; 35 I. C. 991; *Prafulla* (1925) 30 C. W. N. 94; 27 Cr. L. J. 147; A. I. R. 1926 C. 345; 91 I. C. 883. *See also* *Kasem Ali* (1926) 45 C. L. J. 204; 28 Cr. L. J. 449; A. I. R. 1927 C. 949; 10 I. C. 481.

72. Singleton (1924) 29 C. W. N. 260; 41 C. L. J.

87; 26 Cr. L. J. 662; A. I. R. 1925 C. 501; 86 I. C. 38.

73. *Manindra* (1914) 41 C. 754; 18 C. W. N. 580; 15 Cr. L. J. 402; 23 I. C. 1002 [relying on *Romesh* (1913) 41 C. 350; 18 C. W. N. 498; 15 Cr. L. J. 385; 23 I. C. 985]. *See also* *Umadasi* (1924) 52 C. 112; 28 C. W. N. 1046; 40 C. L. J. 143; 26 Cr. L. J. 11; A. I. R. 1924 C. 1031; 83 I. C. 491.

74. Singleton (1924) 29 C. W. N. 260; 41 C. L. J. 87; 26 Cr. L. J. 662; A. I. R. 1925 C. 501; 86 I. C. 38.

however this may be, the verdict of guilty under S. 196 was a legal verdict, and this Court has no power to interfere with it."⁷⁵ Where, in a case of abduction, the principal offenders were acquitted under S. 342 I. P. C., but convicted under S. 366 I. P. C., and the abettors were convicted under S. 368 read with S. 109 I. P. C. :—*Held*, that as the principal offenders had been acquitted under S. 342 and there was no conviction or even accusation against them under S. 368, the conviction of the abettors under S. 368 read with S. 109 was illegal.⁷⁶

A verdict of 'guilty' may also be set aside, when there is no legal evidence, though the Judge pointed this out to the Jury, i. e., though there was no misdirection or non-direction.⁷⁷ Although a scintilla of evidence would not justify the Judge in leaving a case to the Jury and there must be evidence on which they might reasonably and properly conclude the fact to be established, it is not correct to say that a matter can be left to the Jury only if the evidence relating to it is satisfactory, trustworthy and conclusive.⁷⁸ (See Notes under the preceding Heading, *Result of the appeal, where there is no point of law*). The Appellate Court may deal with the case of a prisoner who has not appealed, and may pass such order, sentence or judgment as it thinks fit, and therefore set aside his conviction.⁷⁹

But there may be other errors of procedure or errors of law which do not vitiate the trial, but may be cured by S. 537 Cr. P. C. If they cannot be cured by S. 537, they may come in under 'misdirection' *in effect* and then the provision of S. 423 (2) will apply. Thus, in a case, where the examination of the witnesses for the prosecution and the examination of the accused were concluded, the accused was not called upon to enter on his defence after the Public Prosecutor had summed up his case, as required by the last paragraph of S. 289 Cr. P. C., nor did the Sessions Judge charge the Jury as required by S. 297 Cr. P. C., and the Jury, without hearing the charge, found the prisoner guilty and the Sessions Judge convicted and sentenced him, *Held*, that the formality of calling upon an accused person to enter on his defence under S. 289 is not a mere formality, but is an essential part of a criminal trial, and omission to do so occasions a failure of justice and is not cured by S. 537; and that to allow the Jury to pronounce their verdict before the accused is called upon to enter on his defence, is a misdirection in effect and in such a case S. 423 (2) does not stand in the way of the Appellate Court's interfering with the verdict of the Jury.⁸⁰ So, the omission to call witnesses, or the refusal to allow a material witness to be called for the defence, has been held an error in law and a misdirection, as the Jury was deprived of the opportunity to consider their statements.⁸¹ Where the two approvers were illegally placed on trial with the other accused and their depositions before the Committing

75. Oodun Lall (1865) 3 W. R. 17.

76. Todbul Hossain (1929) 33 C. W. N. 891 : 31 Cr. L. J. 646 : A. I. R. 1929 C. 767 : 124 I. C. 326.

77. Chand (1867) 7 W. R. 6.

78. Ramchariter (1927) 7 P. 15 : 28 Cr. L. J. 692 : A. I. R. 1927 P. 370 : 103 I. C. 548 [the

dictum of Jenkins, C. J. in Upendra (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113, considered.]

79. Jaffir Ali (1873) 19 W. R. 57.

80. Imam Ali (1895) 23 C. 252.

81. In re Raja Padaiyachi (1890) 2 Weir 405 ; Luckhy (1875) 24 W. R. 18.

Magistrate were admitted in evidence, when the other accused had no opportunity to cross-examine them, it is impossible to say that the Jury were not influenced by these irregularities in the trial which must have prejudiced the accused.⁸² Omission to examine the accused under S. 342 Cr. P. C., has been held, in effect, to amount to an error in law and misdirection.⁸³ Where illegal evidence has been admitted, the appeal should be dealt with on the same principle as an appeal in which there has been a misdirection by the Judge or an omission on his part to give the Jury the proper direction.⁸⁴ Want of legal evidence is an error of law, and if the Jury convicts, the verdict must be set aside as it is founded on misdirection, in as much as the Judge failed to direct the Jury to find a verdict of 'not guilty'.⁸⁵ Many such instances will be found in the Reports.

Thus, many errors in law or procedure have been held to come in under 'misdirection' *in effect* and the provision of S. 423 (2) has been applied to them. 'Misdirection' has been interpreted in its wider sense to include illegal reception or rejection of evidence.⁸⁶ But it cannot be said that 'misdirection' includes *all* errors of law or procedure; as for instance, when the trial itself is illegal, or the verdict itself is repugnant or where there is no legal evidence; in such cases the verdict has been set aside in appeal, though no question of misdirection arose, as has already been noticed. *Quære*: Whether the High Court has inherent powers to reverse a verdict and order a new trial, where the proceedings were so entirely wrong or contrary to the principles of justice that it could not say whether or not the verdict was a true or false judgment on the facts.⁸⁷ See, however, the new S. 561 A. Cr. P. C., added by S. 156 of Act XVIII of 1923:—"Nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice".

7. Verdict erroneous owing to misdirection—S. 423 (2) and S. 537 (d) Cr. P. C.—

It should be noted that in S. 423 (2) the word 'misdirection' only is used, while in S. 537 (d) the words used are "misdirection in any charge". The word 'charge' here can only mean the charge delivered by the Judge under S. 297. But misdirection, in its wider sense, has been held to include not only misdirection in the charge, but also illegal reception or rejection of evidence and other irregularities in the procedure. (See Notes under the preceding heading). And these latter classes of misdirection may come in under the provision of Cl. (a) of S. 537. So, to affect the verdict of the Jury, or the sentence or order resulting from such verdict, it must be *erroneous* under

82. Ramatevan (1892) 15 M. 352; 2 Weir 394.

See also Luckhy (1875) 24 W. R. 18.

83. In re Raja Padaiyachi (1890) 2 Weir 405, 407.

84. Ramswami (1869) 6 B. H. C. R. 47;
Ramchandra Govind (1895) 19 B. 749.

85. Greedhary (1867) 7 W.R. 39; Asimuddin (1920)

32 C. L. J. 89; 22 Cr. L. J. 60; 59 I. C. 204.

86. Barendra (1923) 28 C. W. N. 170 (F. B.); 38 C. L. J. 411, 566; 25 Cr. L. J. 817; A. I. R. 1924 C. 257; 81 I. C. 353.

87. Lalsing (1889) Rat. 452, 454.

S. 423 (2), and it must *in fact occasion a failure of justice* under S. 537.⁸⁸ It should be noticed that whether a particular breach of the procedure prescribed in the Code vitiates the proceedings or not must depend upon the gravity of the breach and the consequences that are presumed or proved to have flowed from it.⁸⁹ It has been observed also that disregard even of the mandatory provisions of the Code can be cured by S. 537, provided there has been no failure of justice. "No doubt after *Subramania Iyer v. E.* 25 M. 61 (P. C.) an idea prevailed that S. 537 did not apply to the mandatory provisions of the Code although there is nothing in the Section itself to give it such a restricted scope. But the decision in *Abdul Rahim v. E.*, 5 R. 53 (P. C.) has dispelled that idea and S. 537 may be taken to cover any irregularity in the widest sense of that term provided there has been no failure of justice".⁹⁰ The question then arises, whether the High Court should go into evidence to find out whether the verdict is 'erroneous' causing in fact a failure of justice, or whether from the nature of the misdirection itself, it may conclude that the verdict is erroneous and, therefore, as necessarily occasioning a failure of justice. There is some conflict of decision on this question, as the following cases will illustrate.

Before a verdict can be interfered with, the Court must be satisfied that such verdict is erroneous owing to a misdirection by the Judge or a misunderstanding on the part of the Jury as to the law laid down by him. Where the law has been clearly laid down by the Judge, no question can be raised as to the law laid down by him being misunderstood by the Jury. The question whether the verdict is erroneous owing to a misdirection by the Judge resolves itself into two other questions : *First*, whether there was any misdirection by the Judge ; and, *secondly*, if there was any misdirection by the Judge, whether it can be said that the verdict was erroneous owing to such misdirection, or, in other words, whether within the meaning of S. 537 Cr. P. C., the misdirection has occasioned a failure of justice.⁹¹ In the above case, it was further held that the provisions in S. 423 (d) (now S. 423 (2)) and S. 537 do not require that the Court is to go through the facts and find for itself whether the verdict is *actually* erroneous upon the facts, and that it is sufficient if the misdirection was of a nature such that *it may reasonably be supposed* that the verdict was erroneous by reason of such misdirection or, in other words, that there has been a failure of justice by reason of such misdirection. The word 'erroneous' is not to be read as meaning "wrong on the facts" ; it must be read in connection with the words that follow as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law. The effect of the clause is evidently to

88. Nanhak (1934) 13 P. 529 : 35 Cr. L. J. 1104 : A. I. R. 1934 P. 309 : 150 I. C. 687.

89. See Erman Ali (1930) 57 C. 1228 (F. B.) : 34 C. W. N. 295 : 51 C. L. J. 171 : 31 Cr. L. J. 536 : A. I. R. 1930 C. 212 : 123 I. C. 664, per Page, J. [relying on *Allen v. Flood*, 1901 A. C. 504].

90. Per Jackson, J. in re Annai Errapa (1929) 31 Cr. L. J. 827 : A. I. R. 1930 M. 186 : 125 I. C. 253. See also *Kapoorchand v. Suraj Prasad* (1933) 55 A. 301 (F. B.) : 34 Cr. L. J. 414 : A. I. R. 1933 A. 264 : 142 I. C. 537 : *Nga U. Khine* (1934) 13 R. 1 : 36 Cr. L. J. 665 : A. I. R. 1935 R. 98 : 155 I. C. 66.

91. Ali Fakir (1897) 25 C. 230.

prevent the Appellate Court from reversing the verdict of a Jury on account of any misdirection by the Judge, or any misunderstanding on the part of the Jury of the law as laid down by him unless such misdirection or misunderstanding of law is on a point material to the verdict, so that the verdict can be said to be tainted with error in the process by which it has been arrived at. It throws on the Appellate Court the duty, no doubt, of ascertaining whether the process or method which the Judge directed the Jury to follow as to the acceptance or discarding of evidence, or, as to the view taken of the law, was erroneous on any material point, but not certainly the duty of determining for itself whether the verdict, as a conclusion of fact, was right or wrong. To hold otherwise would be tantamount to holding that an appeal would lie upon the facts from the verdict of a Jury in the face of the provisions of S. 418, and that the Legislature intended to give the High Court the same powers in respect to an appeal from the verdict of a Jury as it has in respect of a judgment by the Sessions Judge in a trial with assessors.⁹² Where the accused were charged with a number of offences which are of a complex character, it was very necessary for the Judge to have explained to the Jury what the elements are which go to constitute each of those offences and he should have clearly placed before them the distinction between them; his failure to do so is a *material* misdirection, that is, one which has made the verdict *erroneous*, and led to a failure of justice.⁹³ Generally, therefore, when the High Court found that the misdirection was *serious* or *material*, it held it to be erroneous from the very nature of the misdirection and set aside the verdict, whether of acquittal or conviction.⁹⁴

It is not possible to predicate the effect of a misdirection on the Jury, but if it is calculated to mislead them on a material point and to prejudice the prisoner, it has in fact occasioned such failure.⁹⁵ There must be reasonable ground for apprehending that it may have affected the verdict, i. e., that the verdict might have been different if the Jury had been rightly directed.⁹⁶ If a proper direction is not given by the Judge in respect of a matter on which the Judge should have done so, then it is not open to the High Court in appeal to guess and gamble whether or not the Jury's verdict would have been different if such direction had been given.⁹⁷ Where the High Court was not prepared to hold that the Jury's verdict

92. Wafadar Khan (1894) 21 C. 955 [referring to Makin v. Attorney-General, L. R. (1894) A. C. 57].

93. Biru (1897) 25 C. 561 [relying on Wafadar Khan (1894) 21 C. 955]; Mari Valayan (1906) 30 M. 44 : 5 Cr. L. J. 78.

94. See Sadhu Sheikh (1900) 4 C. W. N. 576; Keshab (1909) 9 C. L. J. 380 : 10 Cr. L. J. 498 : 4 I. C. 120; Mohammed Yunus (1922) 50 C. 318 : 25 Cr. L. J. 467 : A. I. R. 1923 C. 517 : 77 I. C. 819; Raman (1897) 21 M. 83 : 2 Weir 503; Thandraya (1902) 25 M. 38 : 2 Weir 733; Hughes (1891) 14 A. 25 : 11 A. W. N. 170; Waman (1903) 27 B. 626 : 5 Bom. L. R. 599; Yesu (1853) Rat. 644;

Suryyakanta (1919) 24 C. W. N. 119, 128 : 31 C. L. J. 20 : 21 Cr. L. J. 802 : 58 I. C. 674; Satya Charan (1924) 52 C. 223, 229 : 26 Cr. L. J. 1155 : A. I. R. 1925 C. 666 : 88 I. C. 515; Ainuddi (1921) 34 C. L. J. 515, 517 : 23 Cr. L. J. 344 : 66 I. C. 1000; Mohammad Israil (1929) 31 Cr. L. J. 33 : A. I. R. 1930 A. 24 : 120 I. C. 264.

95. Sadhu Sheikh (1900) 4 C. W. N. 576, 581.

96. Dhiraji v. Akasi (1926) 24 A. L. J. 506, 510 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.

97. Jahur Sheikh (1926) 30 C. W. N. 912 : 45 C. L. J. 20 : 27 Cr. L. J. 1402 : A. I. R. 1926 C. 1107 : 98 I. C. 714.

was due to the misdirection in the charge and that apart from this they would not have come to the same conclusion, the verdict of acquittal was not disturbed.⁹⁸ In one case, however, it has been held by the Calcutta High Court that before the High Court can interfere with the verdict of a Jury it must be reasonably satisfied that not only had the Judge misdirected the Jury but that his misdirection had caused them to come to a conclusion which was in fact wrong. (In this case the High Court weighed the evidence).⁹⁹

A different interpretation has been put in some cases as to the effect of the provisions contained in S. 423 (2) and S. 537, from that put forward in *Wafadar Khan v. Q. E.*,¹⁰⁰ *ante*. Thus, it has been held in a Madras case that in order to determine if the verdict is erroneous, it is absolutely necessary for the High Court to go into the facts and to consider the evidence.¹⁰¹ In this case Benson, J., observed :—"We cannot say that there has, in fact, been a failure of justice, without considering the credibility of the evidence and I think it would be unreasonable and contrary to the express direction of S. 537, to hold that once a misdirection,—even though it be an important one—is established, we are bound mechanically to order a retrial, even though in our judgment the evidence for the prosecution is untrustworthy." In the same case Benson, J., said :—"The words 'in fact' in S. 537 were introduced into the Code of 1898 apparently in order to emphasize the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error." The Bombay High Court¹⁰² observed that no authority was cited for the interpretation of the word 'erroneous' in S. 423 (2) in case of *Wafadar Khan v. Q. E.*, *ante*. The High Court can go into the facts and decide for itself whether the decision of the lower Court is right on the merits or whether the misdirection or the illegal admission of evidence has occasioned a failure of justice. And where the facts to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered.¹⁰³

The High Court has to consider the facts of the case in order to see whether the Judge has done his duty in laying the case before the Jury for their consideration, that is to say, to find out whether there has been any misdirection or error of law in the case ; but the High Court has no power to go into the facts of the case in order to see whether or not the conviction was right ; that stands entirely upon the verdict of the Jury.¹⁰⁴ S. 423

98. Shyam Sundar (1921) 26 C.W.N. 558 : 24 Cr. L. J. 143 : A. I. R. 1922 C. 106 : 71 I. C. 367.

99. Sarojkumar (1932) 59 C. 1361 : 55 C. L. J. 439 : 33 Cr. L. J. 854 : A. I. R. 1932 C. 474 : 139 I. C. 873.

100. (1894) 21 C. 955.

101. Smither (1902) 26 M. 1, 16 : 2 Weir 551 [*per* Benson, J. disagreeing with the view taken in *Wafadar Khan* (1894) 21 C. 955 and *Ali Fakir* (1897) 25 C. 230]. See also *Abdul Hameed* (1912) 36 M. 585, 587, 590 : 15 Cr. L. J.

197 : 22 I. C. 981 ; *Arumuga* 1933 M. W. N. 320.

102. *Ramchandra Govind* (1895) 19 B. 749.

103. *Ramchandra* (1932) 35 Bom. L. R. 174 : 35 Cr. L. J. 747 : A. I. R. 1933 B. 153 : 148 I. C. 553.

104. See *Nimchand* (1873) 20 W. R. 41 ; *Birendra* (1903) 30 C. 822, 828 : 7 C. W. N. 639 ; *Upendra* (1914) 19 C. W. N. 653, 662 (F.B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; *Ikramuddin* (1917) 39 A. 348, 351 : 18 Cr. L. J. 491 : 39 I. C. 331.

(2) throws on the Appellate Court the duty, no doubt, of ascertaining whether the process or method which the Judge directed the Jury to follow as to the acceptance or discarding of evidence, or as to the view taken of the law, was erroneous on any material point, but not certainly of determining for itself whether the verdict, as a conclusion of fact, was right or wrong.¹⁰⁵ In the language of the Privy Council, it may be said that the jurisdiction of the Appellate Court involves a general consideration of the evidence and of the circumstances of the case in order to place the irregularities complained of, if substantiated, in their proper relation to the whole matter.¹⁰⁶ In a recent decision of the Calcutta High Court,¹⁰⁷ all the cases noted above have been reviewed and it has been observed that the later decisions of the Calcutta High Court show that the High Court has power, in the event of any misdirection by the Judge or admission of inadmissible evidence, to deal with the whole case on the merits and to dispose of the whole case finally.

If the misdirection be on a point not material to the verdict, if it is of such a nature that it cannot reasonably be supposed that the verdict was erroneous by reason of such misdirection, then such misdirection will be covered by S. 537 and the verdict will not be interfered with. Thus, a conviction obtained on a trial by Jury would not be bad merely because the charge to the Jury was not happily expressed or there was misdirection in the charge, if in fact there has been no failure of justice.¹⁰⁸ Where the case is not free from difficulty and a great deal could be said on both sides, but it cannot be said that the Jury's view was a bad view or an impossible view, the Court is not justified in reversing their verdict.¹⁰⁹ Where the Judge did not properly explain to the Jury the distinction between murder and culpable homicide, the misdirection could not possibly have prejudiced the accused when the verdict is one of guilty on the charge of culpable homicide not amounting to murder.¹¹⁰ The finding that there are certain omissions and non-directions is not enough; the Court of appeal must be satisfied on a persual of the charge and the material evidence in the case that the omissions are so important that it may be reasonably said that they have led to an erroneous verdict.¹¹¹ Even if a material portion of the evidence has not been placed before the Jury, that itself is not enough to vitiate the verdict; the question in each case is whether there has been prejudice.¹¹² The High Court has to see whether it is reasonably probable that the Jury would not have returned the verdict but for the misdirection complained of.¹¹³

105. Wafadar Khan (1894) 21 C. 955.

106. Ibrahim 1914 A. C. 599 : 18 C. W. N. 705 (P. C.) : 15 Cr. L. J. 326 : 23 I. C. 670.

107. Benoyendra (1936) 40 C. W. N. 432 : 37 Cr. L. J. 394 : A. I. R. 1936 C. 73 : 161 I. C. 74.

108. Hooper (1913) 12 A. L. J. 149 : 14 Cr. L. J. 638 : 21 I. C. 685 ; Dhiraji v. Akasi (1926) 24 A. L. J. 506 : 27 Cr. L. J. 785 : A. I. R. 1926 A. 429 : 95 I. C. 385.

109. Chupai (1933) 10 O. W. N. 971 : 35 Cr. L. J. 285 : 147 I. C. 53 ; Hari Mahto (1935) 27

Cr. L. J. 320 : A. I. R. 1936 P. 46 : 160 I. C. 675.

110. Krishnadhan (1894) 22 C. 377.

111. Kasimuddin (1934) 60 C. L. J. 45 : 36 Cr. L. J. 480 : A. I. R. 1935 C. 31 : 154 I. C. 110 ; Balmokand (1915) 17 P. R. 1915 : 16 Cr. L. J. 354 : 28 I. C. 738.

112. Rahim Beg (1924) 7 N. L. J. 208 : 27 Cr. L. J. 217 : A. I. R. 1925 N. 154 : 92 I. C. 169.

113. Ilu (1934) 62 C. 337 : 36 Cr. L. J. 353 : A. I. R. 1934 C. 847 : 153 I. C. 454.

From the decisions of the Court of Appeal in England it would seem that the principle on which the Court interferes is this : That the Court will not interfere on the ground of misdirection if it is satisfied that the Jury must inevitably come to the same conclusion upon a proper direction ; but if the Court comes to the conclusion that upon a proper direction the Jury *might* have come to the same conclusion but not that they *must* have come to it, the Court must allow the appeal.¹¹⁴ To have any effect in itself the mistatement of the evidence or the misdirection as to the effect of the evidence must be such as to make it *reasonably probable* that the Jury would not have returned their verdict of guilty if there had been no misstatement.¹¹⁵ A mistake of the Judge or an omission to refer to some point in favour of the prisoner is not a wrong decision on a point of law, but comes within the wide words "any other ground" in the English Criminal Appeal Act of 1907, so that the appeal should be allowed according as there is or is not a 'miscarriage of justice' ; there is such a miscarriage of justice not only when the Court comes to the conclusion that the verdict of guilty was wrong but also when the Court comes to the conclusion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about that verdict and when, on the whole facts and with a correct direction, the Jury might fairly and reasonably have found the appellant not guilty.¹¹⁶

8. How a Summing up is to be judged.

The summing up must be looked at as a whole,¹¹⁷ and its substance rather than its terms should be looked into,¹¹⁸ especially where Counsel has dealt with the case exhaustively and the case is plain.¹¹⁹ The summing up must be read as a whole, and it is not fair to criticize, nor does the Court of Criminal Appeal ever criticize, summings up as if the Judge were writing an accurate treatise on the branch of the criminal law with which he is then dealing ; but when it is found that the effect of the evidence has been improperly put to the Jury, there has been miscarriage of justice.¹²⁰

In a very early decision¹²¹ of the Calcutta Court, L. S. Jackson, J., said,—“I think we must deal with each case upon its own merits and, taking as we are bound to take, the charge of the Judge to the Jury as a whole, say whether its tendency has been, upon the whole, to give a correct or incorrect direction to the mind of the Jury. * * * It would be an altogether misplaced rule for us to apply to the directions of a Judge in a mofussil Court the same criticism which we would to a charge of a Judge in an English Court of Assizes. In another case,¹²² as regards procedure it was observed that so long as proceedings were in conformity with the Code (in that case the Code of 1861) and in the absence of a distinct provi-

114. Schama v. Abramovitch (1914) 84. L. J. K.B ;
(1914) L. J. K. B. 396 C. C. A ; Perfect
(1917) 117 L. J. 416 C. C. A ; Blissill (1918)
82 J. P. 194 C. C. A ; Jones (1922) 16 Cr.
A. R. 124 ; Redd (1923) 16 Cr. A. R. 124.
115. Wann (1912) 7 Cr. A. R. 135.
116. Cohen and Bateman (1909) 2 Cr. A. R. 207.
117. Crippen (1910) 5 Cr. A. R. 267 ; Kleis (1910)

4 Cr. A. R. 101 ; Butler (1910) 4 Cr. A. R
146.
118. Carter (1912) 7 Cr. A. R. 92.
119. McDougall (1912) 7 Cr. A. R. 130.
120. Mason (1909) 73 J. P. 250 C. C. A.
121. Gagalu (1869) 4 B. L. R. App. Cr. 50.
122. Hurry Prosad (1870) 24 W. R. 59.

sion to the contrary, the proceedings ought not to be examined by the light of English rules of procedure. A masterly summing up satisfying criticism it is given to a few Judges to make, nor is it an invariable accomplishment of Judges elsewhere; but where the Judge has recapitulated what the witnesses said, has pointed out how it bears upon the charges, has drawn attention to what he considers weak parts and given what appears to be sensible suggestions to the Jury in respect of the conclusions to be drawn from the evidence, it cannot be said that there has been any failure of justice.¹²³

A charge to the Jury should be read as a whole. If there are salient propositions of law in it, these will of course be the subject of separate analysis. But in a protracted narrative of facts, the determination of which is ultimately left to the Jury it must needs be that the view of the Judge may not coincide with the views of others who look upon the whole proceedings in black type. It would, however, not be in accordance either with usual or with good practice to treat such cases as cases of misdirection, if, upon the general view taken, the case has been fairly left within the Jury's province.¹²⁴

The following observations of Markby, J., point out how the Sessions Judge's summing up to the Jury should be dealt with by the High Court, first as regards the law, and then as regards the facts:—"There is a very clear line of distinction to be drawn between the various objections that have been taken before us. So far as these objections are objections to the summing up of the Judge upon points of law, we are bound to examine the Judge's observations with the greatest possible nicety. I do not at all mean to say that we are to apply to the record of his observations, which we have before us, minute verbal criticisms; but we are bound to see that he has laid before the Jury what the law is upon the case which they had to deal with, and that he has laid it down rightly. But so far as these objections are objections to the observations which the Judge has made upon the facts of the case, they ought to be looked upon in a totally different light. What a Judge says to a Jury upon the law is an absolute and binding direction upon them. What he addressed to them upon the facts are only such observations as he thinks it necessary and proper to make in assisting them to arrive at a conclusion upon the evidence which it was wholly within their province to deal with as they think proper, and the observations which a Judge would make to a Jury upon the facts would be determined by circumstances which must vary, one may almost say, in every case and in every tribunal in the country. They would vary in a very great degree according to the intelligence of the Jury whom the Judge was addressing; they would also vary very much, according as the case had or had not been fully discussed both for and against the prisoner by Counsel prior to his addressing them. Had there been no discussion of a case by Counsel, it would undoubtedly be necessary for the Judge to point out many things which, after the case has been fully discussed on both sides, both for the Crown and for the prisoner, might well seem to be unnecessary. And on the other hand, a Judge has very often to caution a Jury against accepting without very careful consideration some of the suggestions that are

123. Hurry Prosad (1870) 24 W. R. 59.

124. Channing Arnold (1914) 41 I. 149; 41 C. 1023
(P. C.): 18 C. W. N. 785; 20 C. L. J. 161;

26 M. L. J. 621; 16 Bom. L. R. 544; 12 A.
L. J. 1042; 15 Cr. L. J. 309; 23 I. C. 661.

made to them. When we are called upon to say whether or not the Judge has done his duty in addressing the Jury on the facts, we must look to the summing up as a whole and see that the case has been fairly laid before them. It is not the duty of this Court to say that the Judge has not properly placed the case before the Jury because he has not adverted to every circumstance which might seem to us to be important. There might be cases no doubt in which it might appear that a summing up of the evidence on the facts was so defective that it was not a fair statement of the case to the Jury, but this summing up cannot be, and has not been, so characterized. It is only said to be defective in not noticing all the considerations favourable to the prisoners; but how far that was necessary would very much depend upon the considerations as to how far the facts and circumstances of the case were brought to the notice of the Jury by the Counsel who had addressed them.¹²⁵ If every defect in summing up were to be regarded as a ground for setting aside a verdict, it is clear that the door of escape would be opened wide to criminals. S.426 (now S.537) however enacts that no sentence shall be reversed on account of any error or defect either in the charge or proceedings unless in the judgment of the Appellate Court the accused person shall have been prejudiced by such error or defect. There is doubtless some difficulty in saying when a prisoner has been prejudiced and it would not be safe to lay down any rule, although in most cases the ends of justice would be satisfied by considering whether, if the case had been tried by a Judge and assessors, the Court would set aside the finding.¹²⁶

The 'summing up' cannot mean any statement of the evidence which a Judge may, in his caprice, think proper to make to the Jury, but a 'proper' summing up, by which is to be understood a full and distinct statement of the evidence on both sides, with such advice as to the legal bearing of that evidence, and the weight which properly attaches to the several parts of it, as a sound judicial discretion would suggest. And in so far as the Judge has not summed up 'properly', an error in matter of law has been committed within the meaning of the Cr. P. Code.¹²⁷ Improper advice given by the Judge to the Jury upon a question of fact, or the omission of the Judge to give that advice which a Judge, in the exercise of a sound judicial discretion, ought to give the Jury upon questions of fact, amounts to such an error in law in summing up as to justify the High Court, in appeal or revision, in setting aside a verdict of guilty.¹²⁸ The observations which a Judge would make to a Jury from the facts would be determined by circumstances which must vary. When a Court is called upon to say whether or not the Judge had done his duty in addressing the Jury on the facts, the Court must look to the summing up as a whole and see that the case has been fairly laid before them.¹²⁹ The charge to the Jury must be judged as a whole and one must see whether judging it as a whole the case for the two sides had been fairly put, so that the Jury can understand what they have to decide and come to a right conclusion.¹³⁰ When the

125. *Nimchand* (1873) 20 W. R. 41, 42.
 126. *Fattechand* (1868) 5 B. H. C. R. 85. See
 Elahee Buksh (1866) 5 W. R. 80 (F. B.).
 127. *Fattechand* (1868) 5 B. H. C. R. 85.
 128. *Elahee Buksh* (1866) 5 W. R. 80 (F. B.).

129. *Mangal Singh* (1931) 8 O. W. N. 344 : 32 Cr.
 L. J. 858 : A. I. R. 1931 O. 171 : 132 I. C.
 232.
 130. *Hari Charan* (1921) 34 C. L. J. 512 : 23 Cr. L.
 J. 342 : 66-I. C. 998.

High Court finds that the charge has been fully and properly explained to the Jury and there has been no miscarriage of justice, it does not interfere with the verdict.¹³¹ It is no doubt essential that in the general observations that a Judge makes in the course of a charge to the Jury, he should be accurate, and within the limits of what has always been allowed from time to time in criminal trials. But the mere fact that the charge is open to criticism does not justify interference with the verdict of the Jury, except where the charge, taken as a whole, cannot be supported.¹³²

Where the charge to the Jury states the law correctly and places the case before the Jury both as it stood against the prisoners and as it stood in their favour, and left the Jury to decide on the evidence which was admissible and relevant : *Held*, that the conclusion on the facts arrived at by the Jury, which was eminently reasonable, should not be interfered with.¹³³ Where a charge is, on the whole, distinctly favourable to the defence, it is difficult to say that there is any misdirection. But if the defence case is not adequately put before the Jury and improper evidence is admitted, the verdict should be set aside.¹³⁴ It is not to be expected that a Judge should comment on every point that could possibly be urged in favour of the accused. It is sufficient if the Judge deals with the more important points and does not unduly press on the Jury his own view on questions of fact. In deciding whether there has been a misdirection on the facts the charge to the Jury must be considered as a whole.¹³⁵

Where the Judge failed to comply with the requirements of S. 297 Cr. P. Code, i.e., has not laid down the law by which the Jury should be guided, nor has he properly summed up the evidence, and at the conclusion of the charge directed them to consider the evidence against each prisoner without at the same time requiring them to consider the evidence in favour of each, and also omitted to give them the very necessary direction that if they entertained any reasonable doubt as to the guilt of the accused, they were entitled to have the benefit of the doubt and should be acquitted : *Held*, that there was grave misdirection by the Judge to the prejudice of the accused, and the verdict of guilty should be set aside.¹³⁶ The High Court will interfere in those cases where it is made to appear that the Sessions Judge has prejudiced the accused by omitting from his charge to the Jury points of capital importance telling in the accused's favour.¹³⁷ The test whether an omission in a summing up amounts to a misdirection is whether the omission is of such importance as to have led to an erroneous verdict.¹³⁸

In a trial by Jury, whether the evidence has been adequately criticized by the Judge in

131. Ramsarup (1929) 9 P. 606 : 32 Cr. L. J. 72 : A. I. R. 1930 P. 513 : 128 I. C. 121.

132. Ambar Ali (1928) 33 C. W. N. 55 : 48 C. L. J. 473 : 30 Cr. L. J. 825 : A. I. R. 1928 C. 769 : 117 I. C. 684.

133. Babban (1927) 4 O. W. N. 901 : 28 Cr. L. J. 937 : A. I. R. 1927 O. 549 : 105 I. C. 457.

134. In re Vollayan (1925) 27 Cr. L. J. 176 : A. I. R. 1926 M. 370 : 91 I. C. 960.

135. Abdul Salim (1921) 49 C. 573 : 26 C. W. N. 680 : 35 C. L. J. 279 : 23 Cr. L. J. 657 : A. I. R. 1923 C. 107 : 69 I. C. 145.

136. Sugalgadu (1898) 2 Weir 500.

137. Fakira (1915) 40 B. 220 : 17 Bom. L. R. 1059 : 17 Cr. L. J. 133 : 33 I. C. 309.

138. Sita Ram (1931) 7 Luck 390 : 33 Cr. L. J. 167 : A. I. R. 1932 O. 23 : 135 I. C. 392.

his charge to the Jury must depend upon the special circumstances of the case, such as the constitution of the Jury, their intelligence and education, the elaborateness with which the case has been conducted on both sides, the skill of the defence and a variety of other circumstances.¹³⁹ Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the prosecution and the defence ; one must not parse the headings of the charges as if it were an indictment ; the method of expression and its form may be unsatisfactory, but if in substance what was said was right and proper there can be no ground of complaint though the phraseology and form might be open to question.¹⁴⁰ It is not fair to criticize every line and letter of a summing up ; the charge must be read as a whole ; the substantial question is whether the evidence for the prosecution and the case for the defence were fairly summed up.¹⁴¹ Where a charge to the Jury is upon the whole favourable to the accused, and most of the points of importance in favour of the accused are more or less dealt with in the charge, the mere fact that some of the points are not so amplified as they might have been does not amount to misdirection.¹⁴² An appellant who seeks to set aside the result of a trial by Jury has a task of considerable magnitude, and must, to be successful, present a case of real substance.¹⁴³

In a case of alleged rape on a Hindu woman by three Mahomedans, where there were four Hindu and one Mahomedan jurors, it was considered necessary to take that fact into account in determining whether the Judge gave sufficient assistance and guidance.¹⁴⁴

9. Procedure to be followed when the High Court sets aside the verdict under S. 423 (2).— Order of re-trial.—

There is some conflict of opinion on this point. In *Wafadar Khan v. Q. E.*,¹⁴⁵ the High Court held that after coming to the conclusion that the verdict has been vitiated by the misdirection of the Sessions Judge, it has no option but to set aside the verdict and direct that the accused be retried. The case of *Taju Pramanik v. Q. E.*,¹⁴⁶ dissented from this view and there it was held that, once the verdict is out of the way, there is no restriction on the powers of the Appellate Court to deal with the case of which it has complete seizin, in any of the manners provided in S. 423 ; as for example, the High Court has the power either to reverse the finding and sentence and acquit or discharge the accused, or order him to be retried, or alter the finding, maintaining the sentence, or, without altering the finding, reduce the sentence ; nowhere does the law lay down that when the verdict of the Jury is set aside the Court must necessarily direct a new trial.

139. Gajo Singh (1922) 1923 P. 109 : 24 Cr. L. J. 495 : A. I. R. 1923 P. 238 : 72 I. C. 959.

140. Eknath (1916) 1 P. L. J. 317 : 17 Cr. L. J. 353 : 35 I. C. 657 ; Barendra (1923) 28 C. W. N. 170 (F. B.) : 38 C. L. J. 411 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353.

141. Barendra (1923) 28 C. W. N. 170 (F. B.) : 38 C. L. J. 411 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353.

142. Waman (1903) 27 B. 626 : 5 Bom L. R. 599.

143. Rupan Singh (1925) 4 P. 626 : 27 Cr. L. J. 49 : A. I. R. 1925 P. 797 : 91 I. C. 225.

144. Ismail Sarkar (1918) 23 C. W. N. 747 : 19 Cr. L. J. 830 : 46 I. C. 846.

145. (1894) 21 C. 955 [referring to *Makin v. Attorney General*, L. R. (1894) A. C. 57] This case was followed in *Ali Fakir* (1897) 25 C. 230.

146. (1898) 25 C. 711 : 2 C. W. N. 369.

In *Sadhu Sheikh v. E.*¹⁴⁷ it was held that, where a case has been tried by a Jury and the conviction has been set aside on the ground of misdirection, the accused is entitled to have his case retried by a Jury. This case was followed in *Sheikh Hazir v. E.*¹⁴⁸ which held that the power given by S. 167 of the Evidence Act to go into the merits on an appeal arises independently of S. 423 Cr. P. C. and therefore that Section does not apply to a case of misdirection. Where the Judge does really leave no one question of fact for the Jury to decide but decides all himself, and says expressly that in his opinion it is proved that the accused has committed the offence, it practically amounts to no summing up at all, and substantially the case has been tried by the Judge only and not by the Jury; the prisoner has a right to demand that his case may be left to a Jury, and in such a case a re-trial should be ordered, and the High Court is not bound to support the conviction, if, looking into the evidence on the record, it thinks the conviction ought to be confirmed by it, as if the case had been originally tried not by Jury but by a Judge and Assessors.¹⁴⁹ As a matter of fact in many of the earlier decisions, the High Court did go into the facts where the misdirection consisted in defective summing up or in omission to direct on any material point. Thus, where the misdirection consisted in not warning the Jury as to the danger of relying on the uncorroborated testimony of an accomplice, the High Court went into the evidence to find out whether there was, in fact, any corroboration and upheld the conviction where there was corroboration and directed re-trial or discharge or acquittal of the accused where there was no corroboration.¹⁵⁰

In *Ramesh v. Q. E.*¹⁵¹ it has been held that directing a re-trial is a matter of Court's discretion. There can be no doubt that the High Court can go into the evidence to find out whether there is any evidence against any of the accused to go to the Jury in case a re-trial is ordered, and may acquit him if it finds that there is not sufficient evidence against him or that the verdict of the Jury was based on speculation only.¹⁵² In one case the High Court, after finding that there was a misdirection going to the question which of the two parties was really the aggressor, refused to find for itself on the paper-book who was really the aggressive party, and set aside the conviction, but refused to order a re-trial on the ground of the length of time already taken by two previous trials and when the third trial will be somewhat unjust.¹⁵³ The case of *Taju Pramanick, ante* has been relied on in a recent case,¹⁵⁴ where it has been said that no doubt the action which the Appellate Court should take depends on the circumstances of the particular case, but when all the materials

147. (1900) 4 C. W. N. 576.

148. (1910) 14 C. W. N. 493 : 11 C. L. J. 301 : 11 Cr. L. J. 96 : 5 I. C. 315.

149. Shumshere (1868) 9 W. R. 51 [considering Elahee Buksh (1866) 5 W. R. 80 (F.B.)]. See Ramgopal (1868) 10 W. R. 7.

150. Khotub Sheikh (1866) 6 W. R. 17; Bykunt (1868) 10 W. R. 17; Sadhu Mundul (1874) 21 W. R. 69; Jamiruddi (1902) 29 C. 782, 791 : 6 C. W. N. 553.

151. (1919) 46 C. 895 : 23 C. W. N. 661 : 29 C. L. J. 513 : 20 Cr. L. J. 324 : 50 I. C. 660.

152. Basanta (1926) 44 C. L. J. 317 : 28 Cr. L. J. 108 : 99 I. C. 236.

153. Azimaddy (1926) 54 C. 237 : 44 C. L. J. 253 : 28 Cr. L. J. 99 : A. I. R. 1927 C. 17 : 99 I. C. 227.

154. Santiram (1930) 58 C. 96 : 32 Cr. L. J. 10 : A. I. R. 1930 C. 370 : 127 I. C. 657.

are before the Appellate Court and the case has been prolonged for nearly two years and the verdict of the Jury is erroneous owing to the misdirection by the presiding Judge, it is in the interests of justice that the Appellate Court should deal with the matter itself. Where the Judge has failed to invite the Jury to consider carefully what each of the accused said in his statement with reference to the charges framed against him and failed to point out to the Jury the attitude to be taken towards a retracted confession or evidence against a co-accused, *Held*, that the verdict must be set aside and re-trial ordered. ¹⁵⁵

Thus, the decision in *Wafadar Khan's* case not been consistently followed by the Calcutta High Court. ¹⁵⁶ Re-trial was not ordered when the evidence was not strong and a re-trial was not in the interests of justice; ¹⁵⁷ where looking into the evidence placed before the Jury, as summed up by the Judge, the High Court was not satisfied that the case was one where a re-trial should be directed; ¹⁵⁸ when no useful purpose would be served; ¹⁵⁹ or where the case turned on a accomplice's evidence, and the accused had been a long time in jail. ¹⁶⁰ The principle has thus been laid down in *Reg. v. Elahi Buksh* ¹⁶¹ :—"The High Court may in all cases in which a finding of guilty is set aside upon appeal, if it considers it necessary, order a new trial. But if the Court is satisfied that the evidence is wholly insufficient to support any conviction against the prisoner and would, upon the same evidence, have reversed a conviction if the case had been tried without the intervention of a Jury, there is no necessity, and it would be improper, to grant a new trial. In such a case the Court, having set aside the verdict, may order the prisoner to be discharged."

The Allahabad High Court has held that it is open to the Appellate Court to order a re-trial of an accused if it sets aside a verdict on the ground of misdirection, but the Court will do so only in special circumstances, as where the accused has been harassed by repeated trials, or where the evidence is so clearly insufficient or incredible that no Jury can reasonably come to a verdict otherwise, as a matter of practice, the proper course is to direct a re-trial. ¹⁶² The whole object of a trial by Jury is that if an accused has a right to a Jury, he is entitled as of right to call upon the prosecution to obtain a verdict against him on the facts laid before the Jury. Before he can be convicted at all. It is not for the Appellate Court, on the hearing of an appeal

155. Hemanta (1919) 47 C. 46: 30 C. L. J. 29: 21 Cr. L. J. 775: 58 I. C. 455.

156. *Sec Saran* (1926) 21 S. L. R. 356: 28 Cr. L. J. 66: A. I. R. 1927 S. 104: 99 I. C. 98.

157. Abdul Gani (1925) 53 C. 181: 42 C. L. J. 205: 26 Cr. L. J. 1577: A. I. R. 1926 C. 235: 90 I. C. 537. *See also* Mohima (1871) 15 W. R. 37; Jamiruddi (1902) 29 C. 782: 6 C. W. N. 553; Sita Ram (1931) 7 Luck 390: 33 Cr. L. J. 167: A. I. R. 1932 O. 23: 135 I. C. 392.

158. Mozam (1933) 34 Cr. L. J. 682: A. I. R. 1933 C. 563: 144 I. C. 93.

159. Abdul Rahim (1921) 25 C. W. N. 623: 3 C. L. J. 340: 22 Cr. L. J. 606: 62 I. C. 878
Taribullah (1921) 25 C. W. N. 682: 23 Cr. L. J. 244: 66 I. C. 180.

160. Surya Kanta (1919) 24 C. W. N. 119: 3 C. L. J. 20: 21 Cr. L. J. 802: 58 I. C. 674
Mati Lal (1899) 26 C. 560: 3 C. W. N. 412
(1866) 5 W. R. 80 (F. B).

162. *Dhiraji. v. Akasi* (1926) 24 A. L. J. 506: 2 Cr. L. J. 785: A. I. R. 1926 A. 429: 95 I. C. 385.

as distinct from a reference under S. 307, to look at the evidence with a view to see whether another Jury might not have arrived at a verdict of guilty upon another charge. That is to usurp the function of a Jury and substitute the Appellate Court's opinion for the verdict of the Jury. S. 418 provides an appeal on a matter of law only where the trial was by a Jury, and S. 423 must be read with S. 418 so that the Appellate Court has no power to try the accused on matters of fact.¹⁶³

The Bombay High Court in *Q. E. v. Ramchandra*,¹⁶⁴ observed that it is difficult to lay down with precision rules to meet all cases; sometimes it appears after error found that the case depends on conflicting testimony which ought to be weighed by a Court before whom the witnesses appear, and this may be a reason for ordering a new trial; on the other hand, if the evidence is one-sided and practically undisputed, and the result depends on the inference from that evidence, the High Court should not order a re-trial, but should go into the evidence to see whether the verdict is wrong. It observed further that the language used by the Judicial Committee in *Makin v. Attorney-General* (relied on in 21, C. 955) does not apply to the Codes of India. Where the facts have to be determined and the evidence is of such a character as to render it difficult to pronounce any opinion on its character without hearing the witnesses, a new trial may be ordered.¹⁶⁵

The power of the High Court to go into the evidence, instead of ordering a re-trial, has been admitted by the Courts of Madras.¹⁶⁶ Nagpur¹⁶⁷ and Sind.¹⁶⁸ This last case was an appeal by Government from an order of acquittal; and it was contended that the High Court cannot, on setting aside an acquittal, convict the accused on the evidence instead of ordering a re-trial. But it was held that if the High Court has jurisdiction to acquit a person who has been convicted, it may convict him when he has been acquitted; whether it should convict or order a new trial is a matter for consideration in each case. The principle of S. 165 Evidence Act may be adopted to determine whether the misdirection has, in fact, occasioned a failure of justice.¹⁶⁹

In capital sentence cases [S. 418 (2)] though the High Court is not bound by the verdict of the Jury, it must rely on the Jury's verdict if it answers a reasonable test. But if there is no

163. Ikramuddin (1917) 39 A. 348 : 15 A. L. J. 205 : 18 Cr. L. J. 491 : 39 I. C. 331 [relying on Wafadar Khan (1894) 21 C. 955].

164. (1895) 19 B. 749 [not following Wafadar Khan (1894) 21 C. 955]. See Ramchandra (1932) 35 Bom. L. R. 174 : 35 Cr. L. J. 747 : A. I. R. 1933 B. 153 : 148 I. C. 553.

165. Ramchandra (1932) 35 Bom. L. R. 174 : 35 Cr. L. J. 747 : A. I. R. 1933 B. 153 : 148 I. C. 553.

166. Smither (1902) 26 M. I. : 2 Weir 521 [dissenting from Wafadar Khan (1894) 21 C. 955 and Ali Fakir (1897) 25 C. 230].

167. Ramprasad (1924) 26 Cr. L. J. 1090 : A. I. R.

1926 N. 53 : 88 I. C. 178 [following Taju Pramanik (1898) 25 C. 711 : 2 C. W. N. 369 and Smither (1902) 26 M. I. : 2 Weir 521; and not following Wafadar Khan (1894) 21 C. 955].

168. Saran (1926) 21 S. L. R. 356 : 28 Cr. L. J. 66 : A. I. R. 1927 S. 104 : 99 I. C. 98 [relying on Murid (1909) 3 S. L. R. 125 : 11 Cr. L. J. 15 : 4 I. C. 608; Topandas (1923) 25 Cr. L. J. 761 : A. I. R. 1925 S. 116 : 81 I. C. 249 and Ramchandra Govind (1895) 19 B. 749 and not following Wafadar Khan (1894) 21 C. 955].

169. Tirumal (1901) 24 M. 523, 542 : 2 Weir 340.

sufficient evidence to warrant a conviction the High Court can set aside the conviction itself without ordering a re-trial.¹⁷⁰

10. Application of S. 167 of the Evidence Act to appeals from verdicts of Jury.—

When the misdirection consists in the improper admission or rejection of evidence in the course of the Sessions trial, and it is found that that misdirection has affected the verdict, then the question of operation of S. 167 of the Evidence Act comes in. Previous to the enactment of this Section there was S. 57 of Act II of 1855 in precisely the same terms and the rulings in *Reg. v. Elahee Buksh*,¹⁷¹ *Reg. v. Fattechand*,¹⁷² and *Reg. v. Ramswami*.¹⁷³ The principle recognised in S. 167 of the Evidence Act is very important and was followed in the above cases. It is not very infrequent, especially in the Mofasil, that inadmissible evidence creeps into the record in the course of the trial. Is then every trial necessarily to be vitiated by the admission of such evidence? If this were so then, to use the words of Sir Barnes Peacock C. J., in *Reg. v. Elahee Buksh*, "a wide door would be thrown open for the escape of guilty men and the due administration of the criminal law of this country would be placed in the greatest jeopardy in those districts to which trial by Jury has been extended." *Melville, J.*, observed in *Reg. v. Ramswami*: "The duty of the Appellate Court is, in my opinion, first to consider whether the evidence improperly admitted is material, and such as is likely to have exercised a prejudicial influence on the minds of the Jury. If it be so, then it is impossible to know the exact amount of weight which the Jury attached to the particular evidence in question, their verdict is so far invalidated that the Appellate Court cannot any longer accept it as a conclusive decision on the facts. But it does not follow that, on this account, the appellant is entitled to be acquitted and discharged, or even to have the advantage of a new trial. S. 57 of Act II of 1855 and S. 426 Cr. P. C. (of 1861) are expressly designed to obviate any such conclusion, and to prevent the inconvenience and possible failure of justice which it would involve. If the Appellate Court thinks that the verdict is founded, in part, upon evidence which should not have been admitted, or that the appellant has been prejudiced by some misdirection or omission of proper direction on the part of the Judge, the Appellate Court is at liberty to treat the case as if it had been tried by the Judge with the aid of assessors, and if it considered that the evidence (after omitting that portion of it which should not have been admitted) is sufficient to sustain the verdict, it is at liberty to confirm the conviction. It may happen in some cases that the Appellate Court will think it desirable to order a new trial, because the evidence on the record is of such a character as to suggest the consideration that its real value can not be fairly appreciated except by a Court which has the advantage of hearing the evidence given. But in all cases in which it is possible to do so satisfactorily, I think the Appellate Court should form its own conclusion on the evidence, and that it should not, save in exceptional instances, direct a new trial." *Melville, J.*, ordered a new trial on a consideration of the character of the evidence in that case. The other Judge, *Warden, J.*,

170. *Asraf Ali* (1933) 37 C. W. N. 595 : 34 Cr.

L. J. 533 : A. I. R. 1933 C. 426 : 143 I. C.

173.

171. (1866) 5 W. R. 80 (F. B.).

172. (1868) 5 B. H. C. R. 85.

173. (1869) 6 B. H. C. R. 47.

consented to this order for new trial on the further ground that it was more than probable that by the improper admission of the evidence of the two witnesses and by the misdirection in connection therewith, the Jury might have been greatly influenced in finding a verdict of guilty against the accused.

The test applied by Melville, J., in the above case was applied also in many subsequent cases.¹⁷⁴ If the verdict is vitiated owing to reception of inadmissible evidence, the High Court may consider whether after excluding the evidence wrongly admitted the rest of the evidence is sufficient to sustain the verdict; if such evidence does not appear to be conclusive, the High Court may reverse the conviction and order a new trial; it would be speculative to hold that the Jury relied only on the material evidence wrongly admitted in evidence in convicting.¹⁷⁵ The words "in any case", used in S. 165 Evidence Act, are wide, and long ago were interpreted to include criminal trials by Jury.¹⁷⁶

In *K. E. v. Tirumal*,¹⁷⁷ Bhashyam Ayyangar, J., observed: "A Court of Reference or Appeal under this Code is not a mere Court of Error, but the Court, as a Court of Appeal, Reference or Revision, is enjoined by S. 537 Cr. P. Code and S. 167 of the Evidence Act not to reverse or alter the finding or sentence passed by a Court of competent jurisdiction, on account of any error, omission, irregularity, improper admission or rejection of evidence, unless, in its judgment, such error, omission or irregularity has in fact occasioned a failure of justice or unless independently of the evidence objected to and admitted, there was sufficient evidence to justify, or that if the rejected evidence had been received, it ought not to have varied the decision". In determining whether the improper reception of a confession is cured by S. 537, the Court is guided by the rule in S. 167, that is, whether, independently of such confession, the conviction ought to be upheld or set aside on the rest of the evidence.¹⁷⁸

The Calcutta High Court has taken a somewhat different view. In *Ramesh Chandra v. K. E.*¹⁷⁹ it has held that the same principle should be applied to the wrongful admission of evidence as to misdirections of law. It observed that, though improper admission of evidence is not to be a ground itself for interference, yet when the trial is by Jury, there is another factor to be taken into account; under S. 418 Cr. P. C., an appeal lies on a matter of law only, and an Appellate Court cannot substitute its own verdict on the legal evidence for that of the Jury; the Appellate Court should not confirm the conviction or regard the legal evidence as sufficient to justify the decision, unless it is satisfied that the verdict of the Jury would have been the same, if no evidence had been wrongly admitted; the Court must,

174. Ramchandra Govind (1895) 19 B. 749 (in which the conviction was upheld on evidence); Bhima (1896) Rat. 855; Waman (1903) 27 B. 626; 5 Bom. L. R. 599; Dhondi (1896) Rat. 848.

175. Waman (1903) 27 B. 626; 5 Bom. L. R. 599.

176. Ramchandra Govind (1895) 19 B. 749 (See the next Chapter under heading 'Review under the Letters Patent').

177. (1901) 24 M. 523; 2 Weir 340.

178. Tirumal (1901) 24 M. 523, 542; 2 Weir 340.

179. (1919) 46 C. 895; 23 C. W. N. 661; 29 C. L. J. 513; 20 Cr. L. J. 324; 50 C. 660. See also Umadasi (1924) 52 C. 112; 28 C. W. N. 1046; 40 C. L. J. 143; 26 Cr. L. J. 11; A. I. R. 1924 C. 1031; 83 I. C. 491.

after excluding the wrongfully admitted evidence, determine the sufficiency of the legal evidence but not its credibility so as to substitute its own verdict. The observations of *Mookerjee, J.*, in *E. v. Panchu Das*¹⁸⁰ (though it was a case under the Letters Patent Cl. 26) may aptly be quoted here as the general view of the Calcutta High Court on this subject :—"In examining the evidence, the Court must consider whether it may, with reasonable certainty, hold that, even if the evidence improperly admitted had been excluded, the Jury, upon the residue of the evidence, would have brought in a verdict of guilty. If this standpoint were not adopted, the result would be that in every case where evidence had been wrongly admitted and the question was on that ground brought up for review, the accused would practically be deprived of the benefit or what is called by Lord Herschell, L. C., 'the much-cherished right of trial by Jury in criminal cases.'"

In that case the majority of the Judges held that, as it was doubtful whether a reasonable Jury would have found the accused guilty on the residue of the evidence, the conviction must be set aside (as there cannot be an order for retrial on a review under C. 26 of the Letters Patent). Of the minority, *Chaudhuri, J.*, held it is not for the Court to speculate what the Jury would have done, but to arrive at a decision and, after all, one's own mind is the best standard ; and *Walmsley, J.*, held that it is not necessary to ask what view a Jury would take of the evidence, except so far as the opinion of a hypothetical Jury affords a standard of reasonableness.

The case of *Makin v. Attorney-General*,¹⁸¹ relied on in some of the Calcutta decisions has been considered in *Ibrahim v. The King*¹⁸² where it has been held that where it is highly improbable that evidence improperly admitted can have had any influence on the verdict of the Jury, the Appellate Court will be justified in refusing to interfere. In that case the Privy Council, upon a review of the evidence, held that the preponderance of unquestioned over the questioned evidence was so great, that it was impossible, at any rate highly improbable, that the Jury were substantially influenced by that evidence. See also *Reg v. Bertrand*.¹⁸³

Generally, when the admission of inadmissible evidence and the Judge's directions or non-directions in regard to them were wrong, and must have necessarily prejudiced the accused, the High Courts have reversed the conviction and sentence and ordered a new trial.¹⁸⁴ Where a mass of hearsay evidence has been recorded, it is not safe to rely on a subsequent exhortation to the Jury to reject that evidence and to decide on the legal evidence alone, as there is no guarantee that this evidence did not leave some impression on the Jury ; in such a case new trial should be ordered.¹⁸⁵ Retrial will be ordered where

180. (1920) 47 C. 671 (F. B.) ; 24 C. W. N. 501 ;
31 C. L. J. 402 ; 21 Cr. L. J. 849 ; 58 I. C.

181. L. R. (1894) A. C. 57.

182. (1914) A. C. 599 ; 18 C. W. N. 705 (P. C.) ;
15 Cr. L. J. 326 ; 23 I. C. 670.

183. (1867) L. R. 1 P. C. 520, 535.

184. Abaji (1890) 15 B. 189 ; Ramswami (1869) 6

B. H. C. R. 47 (*per* Warden, J.) ; Mohima
(1871) 15 W. R. 37 ; In re Annavi (1915)
39 M. 449 ; 28 M. L. J. 329 ; 16 Cr. L. J.
294 ; 28 I. C. 518 ; Abbas Peada (1898) 25 C.
736 ; 2 C. W. N. 484.

185. Pittampur (1867) 7 W. R. 25 ; Lloyd (1932)
34 Cr. L. J. 294 ; A. I. R. 1933 C. 136 ; 142
I. C. 274.

the character of the rest of the evidence is such that it can be best appreciated by a Jury ;¹⁸⁶ or when it is difficult to adjudge the case thereon,¹⁸⁷ or when further enquiry will elucidate the facts.¹⁸⁸ Retrial should also be ordered when the remaining evidence is such that it cannot be said that there is no evidence, neither can it be said that the evidence is sufficient, but it is such that a Jury might not unreasonably find the accused or some of them guilty.¹⁸⁹

But where the reception of certain inadmissible evidence by the Court did not in fact occasion any failure of justice and where there was sufficient evidence before the Jury to justify the verdict, the Appellate Court will not interfere.¹⁹⁰ Evidence improperly given, to which neither the Judge nor the Jury pays attention, is not a ground for quashing a conviction.¹⁹¹ If the misreception was so trivial that it could not have occasioned a failure of justice, the Court will not order a retrial, but will proceed under S. 167 of the Evidence Act.¹⁹² If a document not *per se* inadmissible is admitted without objection by the accused, though not formally proved, the verdict of the Jury cannot be assailed on appeal on that ground.¹⁹³ The evidence should be gone into, especially when, owing to lapse of time, a re-trial is not advisable.¹⁹⁴

The admission of a statement to the police, inadmissible under S. 162 Cr. P. C., will not justify reversal of the conviction or verdict, or a re-trial, if there be other sufficient evidence and the accused is not prejudiced ;¹⁹⁵ or if it is favourable to the accused ;¹⁹⁶ or if the statement be on an unimportant point not affecting the verdict.¹⁹⁷ But if the admission of such statement seriously prejudices the accused, the verdict will be set aside and retrial ordered.¹⁹⁸

If improper questions have been admitted at a trial it is for the Crown to show that their improper effect has been set right by the Court. Either the Jury should be told at once to disregard the statement, or else the charge should contain a similar warning to them and they should be expressly told that they are not to consider the statement as involving a contradiction or otherwise damaging the evidence of the witness. If it be

186. Ramswami (1869) 6 B. H. C. R. 47 ; Thandraya (1902) 26 M. 38 : 2 Weir 733.

187. Dinanath (1920) 45 B. 1086 : 23 Bom. L. R. 338 : 22 Cr. L. J. 318 : 60 I. C. 1006 ; Ramchandra (1932) 35 Bom. L. R. 174 : 35 Cr. L. J. 747 : A. I. R. 1933 B. 153 : 148 C. 553.

188. Ramswami (1869) 6 B. H. C. R. 47 ; Rupya (1886) Rat. 245.

189. Amrita (1873) 10 B. H. C. R. 497.

190. Harendra (1924) 40 C. L. J. 313 : 26 Cr. L. J. 307 : A. I. R. 1925 C. 161 : 84 I. C. 451.

191. Green (1908) 1 Cr. A. R. 124.

192. Hazir Ali (1910) 14 C. W. N. 493 : 11 C. L. J. 301 : 11 Cr. L. J. 96 : 5 I. C. 315.

193. Ram Bhagwan (1918) 19 Cr. L. J. 886 : 47 I. C. 82 (P.)

194. Lakshmya Bhima (1896) Rat. 855.

195. Kalia (1924) 26 Cr. L. J. 579 : A. I. R. 1925 C. 959 : 85 I. C. 723 ; Ramyad (1925) 1926 P. 13 : 27 Cr. L. J. 753 : A. I. R. 1926 P. 211 : 95 I. C. 273 ; Bahadur Singh (1926) 7 L. 264 : 27 Cr. L. J. 803 : A. I. R. 1926 L. 367 : 95 I. C. 467.

196. Badri (1925) 27 Cr. L. J. 362 : A. I. R. 1926 P. 20 : 92 I. C. 874.

197. Keramat (1925) 42 C. L. J. 528 : 27 Cr. L. J. 277 : A. I. R. 1926 C. 147 : 92 I. C. 453 ; Gahur (1925) 30 C. W. N. 503 : 27 Cr. L. J. 641 : A. R. 1926 C. 793 : 94 I. C. 593.

198. Keramat (1925) 42 C. L. J. 524 : 27 Cr. L. J. 263 : A. I. R. 1926 C. 320 : 92 I. C. 439.

difficult for the Jury to do so and the evidence is material, there should be a new trial.¹⁹⁹

Improper rejection of material evidence will be a ground for a new trial. Thus, where the Sessions Judge did not allow a Police Inspector to be examined for the defence, and the accused was thereby prejudiced, and where evidence taken by the Deputy Magistrate was admitted without the prisoner having an opportunity of examining an admittedly important witness, the High Court quashed the conviction and ordered a new trial.²⁰⁰ A verdict is vitiated by the refusal to admit proper evidence.²⁰¹ Where a material statement of a witness for the defence, after being admitted, was withheld from the Jury, the High Court ordered a new trial.²⁰²

If, after excluding the inadmissible evidence, the remaining evidence is such that the conviction cannot be reasonably based on it, the accused will be acquitted or discharged.²⁰³ When, having regard to the fact that the case against the accused is rather near the borderline and the Jury evidently felt a difficulty about it because they took an hour in considering their verdict, it would be unsafe to say that the effect of improperly letting in evidence, which in substance went to show that the statements of the accused before the Jury were an after-thought, had no effect on the minds of the Jury. In such a case the verdict of the Jury should be set aside.²⁰⁴

11. Re-trial order in Appeal—whether opens up the whole case.—

There is some difference of opinion with reference to this matter, as the following cases will show.

The accused were charged with offences triable by a Jury as well as with offences triable with the aid of assessors, and they were acquitted of the former set of offences but convicted of the latter. On appeal the conviction was set aside and retrial ordered. *Held*: that the retrial for the latter set of offences alone is not illegal where the accused do not object to the confining of the trial to such offences alone. *Per* Ross, J.—Accused who think they are being prejudiced by the non-prosecution of charges other than those for which they are actually tried, must raise the objection before pleading to the charges actually laid against them; prejudice is a question of fact. S. 235 Cr. P. Code is an enabling Section and does not necessitate the inclusion of all charges triable under that Section in one trial. In cases falling within S. 236 Cr. P. C., there is one set of facts which may be viewed in different

199. Kutubuddin Khan (1925) 28 Bom. L. R. 281 : 27 Cr. L. J. 481 : A. I. R. 1926 B. 238 : 93 I. C. 881.

200. Luckhy Narain (1875) 24 W. R. 18.

201. Bhairab (1898) 2 C. W. N. 702. *See also* Panchu (1907) 34 C. 698, 701 : 11 C. W. N. 666 : 5 Cr. L. J. 427.

202. Sakham (1874) 11 B. H. C. R. 166.

203. Belat Ali (1873) 19 W. R. 67 ; Mohima (1871)

15 W. R. 37 ; Taju Pramanik (1898) 25 C. 711 : 2 C. W. N. 369 ; Jaffir Ali (1873) 19 W. R. 57 ; Abdul Sheikh (1919) 23 C. W. N. 933 : 21 Cr. L. J. 183 : 54 I. C. 887 ; Fata Adaji (1874) 11 B. H. C. R. 247 ; Pandharinath (1881) 6 B. 34.

204. Issuf Mahomed (1930) 55 B. 435 : 32 Cr. L. J. 1077 : A. I. R. 1931 B. 311 : 133 I. C. 784,

ways and so where a retrial is ordered, the whole facts are necessarily re-opened and nothing can prevent the Jury from coming to any verdict that they consider right upon the facts proved before them; but where there are two different sets of facts and a verdict has been given on one set which no one impugns, then there is no reason why, when an appeal is brought on the other set of facts, the order of retrial should re-open both. *Per* Kulwant Sahay, J.—Though S. 235 is an enabling Section and does not prevent a separate trial under S. 233, yet, when a joint trial is held under S. 235 and the accused are charged with offences some of which are triable by Jury and some by the Sessions Judge with the aid of assessors, the joint trial must be held as provided by S. 269(3); otherwise the whole trial will be illegal. Where, in such a trial, the accused are acquitted of offences triable by a Jury but convicted of offences triable with assessors and on appeal the conviction is set aside and a retrial ordered, the whole case is re-opened and the accused can be tried again for all the offences, they were charged with.²⁰⁵ When there has been a verdict of a Jury acquitting the prisoners of certain charges and that verdict has not been impugned by way of appeal by the Crown, the prisoners should not again be put in peril for the same offences.²⁰⁶ Where an accused has been tried by a Jury on two charges and on being acquitted under one and convicted under the other he appeals, as a result of which his conviction and sentence are set aside: *Held* by Lort-Williams, J., that he cannot be retried in respect of the charge on which he was acquitted; *held* by Jack, J., that although in such a case an order of re-trial, being one under S. 423(1) (b), cannot in strict law interfere with the order of acquittal, it is settled law in Calcutta, that in the absence of an express limitation the order of re-trial applies to all the charges framed in the original Court.²⁰⁷ In *Naimuddin Biswas v. E.*²⁰⁸ Cunliffe, J., *held* that, when at a trial held by an Assistant Sessions Judge with a Jury, the accused has been convicted of certain offences but acquitted of others, the Sessions Judge cannot, on an appeal by the accused against his conviction, direct his retrial on charges of which he was convicted. He followed the decision in the case of *Nitya Gopal Shadhu v. E.*²⁰⁹ and the opinion of Lort-Williams, J., in *Abdul Khan v. E.*²¹⁰ In his opinion, a contrary view would be repugnant to the ordinary sense of justice and, furthermore, would be contrary to public policy. Henderson, J., did not come to any definite conclusion but he distinguished the case of *Nazimuddi v. E.*²¹¹ and seemed to agree with the view of Cunliffe, J. noted above.

When an accused person is charged with and tried for various offences arising out of a single act or series of acts, it being doubtful which of those offences the act or acts constitute (e.g., offences under Ss. 302, 325 read with S. 149 I. P. C.) (See S. 236 Cr. P. C.), and where he has been acquitted by the verdict of a Jury of some of such offences and

205. Abdul Hamid (1926) 6 P. 208 : 27 Cr. L. J. 1100 : A. I. R. 1927 P. 13 : 97 I. C. 364.

206. *Ibid.*

207. Abdul Khan (1935) 62 C. 928 : 39 C. W. N. 677 : 62 C. L. J. 217 : 37 Cr. L. J. 707 : 162 I. C. 931.

208. (1936) 40 C. W. N. 666 : 63 C. L. J. 124.

209. (1934) 38 C. W. N. 1128 : 36 Cr. L. J. 553 : A. I. R. 1935 C. 120 : 154 I. C. 609.

210. (1935) 62 C. 928 : 39 C. W. N. 677 : 62 C. L. J. 217 : 37 Cr. L. J. 707 : 162 I. C. 931.

211. (1912) 40 C. 163 : 13 Cr. L. J. 497 : 15 I. C. 641.

convicted of others, and appeals against such conviction, and where the Appellate Court reverses the verdict of the Jury, and orders a re-trial without any express limitation as to the charges upon which such re-trial is to be held, such re-trial must be taken to be upon all the charges as originally framed, and the acquittal by the Jury on the previous trial upon some of such charges is no bar to the accused being tried on them again; as having regard to the provisions of S. 423 Cr. P. C., the provisions of S. 403 in that respect cannot apply to such cases.²¹² The interference of the Appellate Court in such a case is directed primarily not against the acquittal, but against the conviction which is called in question by the accused, though if the interference is to be rational and complete, the Appellate Court must deal with the whole case. And it thus becomes more than ordinarily necessary in a case like the above, where the trial is by Jury. Here, if the verdict is found to be erroneous owing to a misdirection by the Judge, it must be set aside in its entirety, as the Appellate Court cannot go into the facts (S. 418 Cr. P. C.) and substitute its own verdict for that of the Jury.²¹³ But where an accused person is charged at one trial with distinct offences constituted by distinct acts, such as the causing of death to A and grievous hurt to B, or the forgery of document A and that of document B, and he is acquitted of one of these offences and convicted of the other, a different principle would apply.²¹⁴ Accused, who were tried for offences under Ss. 333, 225, 323, and 325 I. P. C., were acquitted of the charge under Ss. 333 and 225 but convicted of the other two charges. No appeal was filed against the order of acquittal, but accused appealed from the order of conviction. The case was sent back for retrial, whereupon the Lower Court framed charges under Ss. 333 and 225, the offences of which the accused were already acquitted, and convicted them and this was confirmed on appeal: *Held*, that the Appellate Court Judge could order re-trial only of the charges on which the accused were convicted and against which the appeal was filed, and that the Lower Court Judge was not justified in framing charges and convicting them of the offences in respect of which they had already been acquitted.²¹⁵

12. S. 439 (6) Cr. P. C.—whether controlled by S. 423 (2).—

Sub-S. (6) of S. 439 does not over-ride the provision of S. 423 (2) when there is a question of sentence being enhanced. In such a case the convicted person has only the same rights as regards challenging the actual conviction as he would have had if he had come before the Court by way of a regular appeal preferred by himself or by proceedings in revision instituted by himself. Where a sentence has been passed after a verdict of "guilty" in a trial by Jury, the arguments on behalf of the convicted person before the Appellate Court must be limited to the matters referred to in S. 423 (2).²¹⁶ Where notice has

212. Krishnadhan (1894) 22 C. 377.

213. Krishna Dhan (1894) 22 C. 377, 382.

214. Krishna Dhan (1894) 22 C. 377, 382, 383.

215. Lala (1933) 56 A. 210 : 35 Cr. L. J. 668 : A. I. R. 1933 A. 941 : 148 I. C. 339. See Nitya Gopal (1934) 38 C. W. N. 1128 : 36 Cr. L. J. 553 : A. I. R. 1935 C. 120 : 154 I. C. 609;

216. Khoja Bux (1933) 61 C. 6 : 37 C. W. N. 1122 : 35 Cr. L. J. 554 : A. I. R. 1934 C. 105 : 147 I. C. 1124 [referring to Jorabhai (1926) 50 B. 783 : 27 Cr. L. J. 1173 : A. I. R. 1926 B. 555 : 97 I. C. 805 ; Jnanendra (1929) 56 C. 1145 : 33 C. W. N. 599 : 49 C. L. J. 432 : 30 Cr. L. J. 1038 : A. I. R. 1929 C. 747 ; 119 I. C. 30^m and following Chinto

been issued for enhancement at the time of admission of the appeal by the accused, the appellant is entitled on the evidence to show that he is innocent. If the conviction is not correct or the evidence sufficient for conviction, it is not necessary for the Court to send the case for re-trial even though there may be misdirection or admission of irrelevant evidence as the Court can accept the verdict of the Jury under 167 of the Evidence Act, unless the Court is of opinion that it is difficult to arrive at any conclusion on the evidence and that it is necessary or desirable that a retrial should be ordered ;²¹⁷ that the appeal and the notice should be dealt with together ; the former should not be disposed of before the notice is heard.²¹⁸

13. Enhancement of Sentence.—

Under the combined provisions of Ss. 423 and 439, the High Court has power to alter a conviction under S. 326 I. P. C., to one under S. 302 I. P. C.²¹⁹ When the High Court has before it on appeal a record of a criminal proceeding, the condition precedent to the application of S. 439 is performed, and the High Court can then, though the record has only come to its knowledge in the appellate proceeding, proceed to exercise its revisional power if it chooses to do so and has got complete jurisdiction under S. 439, to enhance the sentence, after notice to the accused to show cause against enhancement.²²⁰ *Prima facie*, the power of the High Court to enhance sentences does not depend upon the powers which the trial Court may have with regard to sentences ; hence, the High Court can enhance a sentence passed by Assistant Sessions Judges up to the maximum sentence prescribed by law.²²¹

14. Reduction of Sentence.—

When the petition of appeal seeks relief in respect of the sentence as well, the High Court has no power, without notice to the Crown and without calling for the records of the case, to reduce the sentence, either by way of allowing the appeal partly, or by way of revision after summary disposal of the appeal ; there can be no room for revision at such stage.²²²

- (1908) 32 B. 162 : 10 Bom. L. R. 93 : 7 Cr. L. J. 119].
217. Ramchandra (1932) 35 Bom. L. R. 174 : 35 Cr. L. J. 747 : A. I. R. 1933 B. 153 : 148 I. C. 553.
218. Pandurang (1934) 58 B. 392 : 35 Cr. L. J. 1435 : A. I. R. 1934 B. 198 : 151 I. C. 865 [disapproving Mangal (1924) 49 B. 450 : 26 Cr. L. J. 968 : A. I. R. 1925 B. 268 : 87 I. C. 424].
219. Mehdi (1933) 35 Cr. L. J. 250 : A. I. R. 1933 L. 661 : 146 I. C. 949 [relying on Kambam Balli (1913) 37 M. 119 : 15 Cr. L. J. 180 : 22 I. C. 756 and On Shwe (1923) I. R. 436 : 25 Cr. L. J. 247 : A. I. R. 1924 R. 93 : 76 I. C. 711].

220. Chunbidya (1934) 62 I. A. 36 : 57 A. 156 (P. C.) : 39 C. W. N. 350 : 60 C. L. J. 398 : 37 Bom. L. R. 160 : 68 M. L. J. 166 : 36 Cr. L. J. 482 : A. I. R. 1935 P. C. 35 : 153 I. C. 936 ; Dahu Raut (1935) 62 I. A. 129 : 62 C. 983 (P. C.) : 39 C. W. N. 626 : 61 C. L. J. 259 : 68 M. L. J. 653 : 37 Bom. L. R. 557 : 1935 A. L. J. 802 : 36 Cr. L. J. 838 : A. I. R. 1935 P. C. 89 : 155 I. C. 386.
221. Ram Nath (1935) 37 Cr. L. J. 49 : A. I. R. 1935 A. 989 : 159 I. C. 290 [following Jagat Singh (1920) I L. 453 : 21 Cr. L. J. 557 : 56 I. C. 861].
222. Dahu Raut (1935) 62 I. A. 129 : 62 C. 983 (P. C.) : 39 C. W. N. 626 : 61 C. L. J. 259 : 68 M. L. J. 653 : 37 Bom. L. R. 557 : 1935

15. Jail Appeal—Subsequent Appeal.—

The Code of Criminal Procedure does not confer more than one right of appeal to an accused person from a conviction and sentence passed on him, nor does the Code of the Letters Patent permit appeal in a criminal matter from an order of one or more Judges of the High Court to other Judges of the Court. Therefore, the High Court has no power to entertain an appeal from the conviction and sentence passed on the accused persons after the dismissal of the appeal which they preferred from Jail, and neither the Bench finally hearing such matter nor the Bench which admitted the appeal has power to review or revise the order of dismissal,²²⁸

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- A. L. J. 802 : 36 Cr. L. J. 838 : A. I. R. 1935 P. C. 89 : 155 I. C. 385.
223. Pem Mahton (1934) 14 P. 392 : 37 Cr. L. J. 58 : A. I. R. 1935 P. 426 : 159 I. C. 241 [referring to Khiali (1922) 44 A. 759 : 23 Cr. L. J. 505 : A. I. R. 1922 A. 480 : 68 I. C. 41 and dissenting from Hulai (1915) 3 O. L. J. 326 : 17 Cr. L. J. 453 : 36 I. C. 133] ; Lachmi Singh v. Bhusi Singh (1917) 19 Cr. L. J. 225 : 43 I. C. 817 (P) ; Gajo v. Debi (1923) 24 Cr. L. J. 481 : A. I. R. 1923 P. 532 : 72 I. C. 945 ; Kunhammad (1922) 46 M. 382 : 24 Cr. L. J. 439 : A. I. R. 1923 M. 426 : 72 I. C. 599 ; Nand Kishore (1919) 1919 P. 514 : 20 Cr. L. J. 447 : 51 I. C. 271 ; In re Tadi Somu Naidu (1923) 47 M. 428 : 26 Cr. L. J. 370 : A. I. R. 1924 M. 640 : 84 I. C. 850 ; Dahu Raut (1933) 61 C. 155 : 38 C. W. N. 25 : 34 Cr. L. J. 1100 : A. I. R. 1933 C. 870 : 145 I. C. 937 [dissenting from In re Tadi Somu Naidu (1923) 47 M. 428 : 26 Cr. L. J. 370 : A. I. R. 1924 M. 640 : 84 I. C. 850 and Ramesh v. Kadambini (1927) 55 C. 417 : 31 C. W. N. 960 : 28 Cr. L. J. 831 : A. I. R. 1927 C. 702 : 104 I. C. 447].

CHAPTER II.

Review under the Letters Patents.

List of Headings :—

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2. Object of the above enactments.
3. Cl. 25—Courts of Original Criminal Jurisdiction constituted by one or more Judges of the High Court.
4. Reservation of a point of law.
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8. Some instances of points of law which have been referred or certified for the review of the High Court :—
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9. Statement of the Judge as to what has taken place at the trial.
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13. Applicability of S. 167 Evidence Act to a review under Cl. 26 of the Letters Patent, when a certain piece of evidence was held to have been improperly admitted or rejected.
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1. Clauses of the Letters Patents.—

Clause 25 of the Letters Patent for the High Court of Calcutta enacts as follows :—

“And we do further ordain that there shall be no appeal to the said High Court of Judicature at Fort William in Bengal from any sentence or order passed and made in any criminal trial before the Court of Original Criminal Jurisdiction, which may be constituted by one or more Judges of the said High Court. But it shall be at the discretion of any such Court to reserve any point or points of law for the opinion of the said High Court.”

And Clause 26, as follows :—

“And we do further ordain that on such point or points of law so reserved as aforesaid, or on its being certified by the said Advocate General, that in his judgment there is an error in the decision of a point or points of law, decided by the Court of Original Criminal

Jurisdiction, or that point or points of law which has or have been decided by the said Court should be further considered, the said High Court shall have full power and authority to review the case or such part of it as may be necessary, and finally determine such point or points of law, and thereupon to alter the sentence passed by the Court of Original Jurisdiction and to pass such judgment and sentence as to the said High Court shall seem right."

Clauses 25 and 26 of the Letters Patent for the High Courts of Madras and Bombay are *mutatis mutandis* on the same terms.

Clauses 24 and 25 of the Letters Patent for the Rangoon High Court are in similar terms except that for the words "Advocate General" there appear the words "Government Advocate". Clauses 18 and 19 of the Letters Patents of the High Courts of Allahabad, Patna and Lahore contain similar provisions for reservations of point or points of law by the Court of Original Criminal Jurisdiction. But there being no Advocate General in these High Courts, no review on the certificate of the Advocate General has been provided.

In this connection should be read the provisions of S. 434 of the Code of Criminal Procedure, which enacts as follows :—

"(1) When any person has, in a trial before a Judge of a High Court consisting of more Judges than one and acting in the exercise of its Original Criminal Jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial."

"(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to jail, or, if the Judge thinks fit, be admitted to bail ; and the High Court shall have the power to review the case or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of Original Jurisdiction, and to pass such judgment or order as the High Court thinks fit."

The above Section is substantially a reproduction of S. 101 of the High Courts Act X of 1875. It enables non-chartered High Courts to act in the same way as the chartered High Courts can under the Clauses of their respective Letters Patent, noted above.

2. Object of the above enactments.—

The object is to prevent errors prejudicing the accused, when an appeal from the decision of a Judge of a High Court, sitting as a Court of Original Criminal Jurisdiction, has been taken away.¹ But it is discretionary with the Judge to reserve and refer to the High Court the

1. Yed (1866) 1 Ind. Jurist (N. S.) 424 ; Scott (1934) 13 R. 104 (F. B.) : 36 Cr. L. J. 595 : A. I. R. 1935 R. 67 : 154 I. C. 837 [overruling U. Zagariya (1925) 3 R. 220 : 26 Cr.

L. J. 1371 : A. I. R. 1925 R. 239 : 89 I. C. 459 ; Pem Mahton (1934) 14 P. 392 : 37 Cr. L. J. 58 : A. I. R. 1935 P. 426 : 159 I. C. 241.

point of law raised ; he may refuse to do so, and such discretion will not be reviewed by the High Court, sitting as a Court of Review, under Cl. 26 of the Letters Patent.² A remedy may be found, if the Advocate General grants a certificate under Cl. 26 of the Letters Patent. Where there is no Advocate General (or Government Advocate) the error, if any, cannot be remedied by the High Court. In such a case the only remaining course left for the accused is to apply to the Government, who, if convinced that there has been an error which has led to miscarriage of justice, may exercise their prerogative of remitting the sentence which has been passed.³ A direction in the nature of *Habeas Corpus*, under S. 491 Cr. P. C, is not applicable to a case where there has been a conviction and sentence after trial.⁴

The Judge also cannot review his own judgment, for the old S. 369 Cr. P. C was held to apply to the judgment of the High Court, and the saving clause therein applied merely to questions of law arising in its original criminal jurisdiction, and which were reserved and subsequently disposed of under the provisions of S. 434 Cr. P. C, and the corresponding Sections of the Letters Patent.⁵ The powers of a single Judge in a matter with which he has jurisdiction to deal are the powers of the Court, and cannot be, in any way, controlled by a Bench or Full Bench of the Court. As no appeal lies, no revision lies. Both proceedings imply subordination or inferiority, which does not exist. Except on a reference under S. 434, the proceedings of such single Judge cannot be revised.⁶ S. 369 has now been amended by Act XVIII of 1923, S. 101, and has been put into its present form, giving effect to the decision in *Q. E. v. Durga Charan*,⁷ above. But a new Section, viz, S. 561A has been added by Act XVIII of 1923, S. 156, saving inherent powers of the High Court to make necessary orders to secure the ends of justice. In a recent case⁸ it was held that S. 561A was in no way limited or governed by S. 369, and that the object of enacting S. 561A was to enable the High Court, when the ends of justice so required, to make such orders as may be necessary (In this case the High Court reduced the sentence which it had confirmed in revision). But this case has since been dissented from,⁹ and it has been held that there has never been an inherent power in the High Court to alter or review its own judgment once it has been pronounced or signed, except in cases where it was passed without jurisdiction or in default of appearance without an adjudication on the merits ; that the words "or otherwise to secure the ends of justice" can only mean that such other inherent

2. Pestanji (1873) 10 B. H. C. R. 75 ; Dayal Jairaj (1866) 3 B. H. C. R. 20.

3. Fox (1885) 10 B. 176 (F. B.) See also In re Bonomally (1916) 44 C. 723 : 21 C. W. N. 167 : 18 Cr. L. J. 311 : 38 I. C. 423.

4. In re Bonomally (1916) 44 C. 723 : 21 C. W. N. 167 : 18 Cr. L. J. 311 : 38 I. C. 423.

5. Durga Charan (1885) 7 A. 672 : 5 A. W. N. 177, per Brodhurst J. See also In re Gibbons (1886) 14 C. 42 (F. B.)

6. Hale (1908) 1 P. R. 1909 : 9 Cr. L. J. 306 :

1 I. C. 506 ; Press (1909) 4 P. R. 1909 : 9 Cr. L. J. 378 : 1 I. C. 747.

7. (1885) 7 A. 672 : 5 A. W. N. 177.

8. Mathra Das (1926) 28 Cr. L. J. 239 : A. I. R. 1927 L. 139 : 99 I. C. 1039.

9. Raju (1928) 10 L. 1 : 29 Cr. L. J. 669 : A. I. R. 1928 L. 462 : 110 I. C. 221. See also Ganpat (1930) 27 N. L. R. 163 : 32 Cr. L. J. 1222 : A. I. R. 1931 N. 169 : 134 I. C. 686 ; Dahu Raut (1933) 38 C. W. N. 25 : 34 Cr. L. J. 1100 : A. I. R. 1933 C. 870 : 145 I. C. 937 ; Kunji Lal (1934) 56 A. 990 : 35 Cr. L. J. 1435 : A. I. R. 1935 A. 60 : 151 I. C. 714.

power as the Court possesses is likewise preserved, and that the High Court is not given nor did it ever possess, an unrestricted and undefined power to make any order which it might please to consider was in the interests of justice ; its inherent powers are as much controlled by principle and precedent as are its express powers by statute ; there is no conflict between S. 561A and S. 369.

3. Cl. 25—Courts of Original Criminal Jurisdiction constituted by one or more Judges of the High Court.—

The above words would include a Special Bench constituted under the Indian Criminal Law Amendment Act XIV of 1908 (new repealed) ; the words would include any Court whether within Cls. 22-24 of the Letters Patent or created by Statute and outside Cls. 22-24 ; Cls. 25 and 26 therefore apply to such a Court.¹⁰

4. Reservation of a point of Law.—

As has been already noticed, the reservation of a point of law is discretionary with the Judge sitting as a Court of Original Criminal Jurisdiction, for Clause 25 of the Letters Patent uses the words "at the discretion of the Court", and S. 434 Cr. P. C contains the words "if the Judge thinks fit."

Where points of law are reserved under the English Statute 11 and 12 Vic. Ch. 78, the Court of Crown Cases Reserved expects the cases to be submitted in a complete form, and will ordinarily refuse to send back a case to the Judge who reserved the points, for amendment.¹¹ Sometimes, however, it will do so, not on the application of Counsel, but if, on the argument, the case appears to have been imperfectly stated.¹² If Counsel should think that a material point has been omitted, it has been considered to have been proper for him to communicate with the Judge who reserved the case, and suggest any amendment that, in his opinion, may be necessary.¹³ (See all the above English cases cited in the judgment of *Westropp* C. J. in *Reg. v. Pestanji* ¹⁴). But the reservation of a point of law under Cl. 25 of the Letters Patent does not amount to 'a case being stated' by the Judge within the meaning of S. 2 of Stat. 11 & 12 Vic. Ch. 78, so as to preclude the High Court from considering any other evidence than those bearing on the point reserved, for the Section simply authorises the Judge to reserve the point of law and directs the High Court, under Cl. 26 to review the case, i. e., all that took place at the trial, so far as is necessary for deciding the question of law and passing the proper judgment and sentence.¹⁵

The first part of Cl. 25 prohibits appeal from any sentence or order passed by a Court of Original Criminal Jurisdiction ; but the last part confers a right on the Court to reserve a point of law for the opinion of the High Court, without any limitation as

10. Muthukumarasawmi (1912) 35 M. 397 (F. B.) :
13 Cr. L. J. 352 : 14 I. C. 896.

11. Halloway, 1 Den C. C. 370.

12. Hicton, Bell C. C. 20.

13. Smith, 14 Jur 92 : 4 Cox. C. C. 42 : 1 Den. C. C. 570.

14. (1873) 10 B. H. C. R. 75.

15. Navroji (1872) 9 B. H. C. R. 358, *per* Sargent, A. C. J.

to the stage when such reservation and reference can be made. The preamble to Stat. 11 & 12 Vic. Ch. 78 limited the power of reference to questions arising after conviction. S. 434 Cr. P. C., also says that reference can be made when the accused has been convicted, i. e., after the close of the trial. But it seems that under Cl. 25 reference can be made at any stage, and in the case of *Q. E. v. Morton*,¹⁶ a reference was made at the commencement of the trial, and the trial was postponed pending the result of the reference. That reference was on a point as to the jurisdiction of the Court to proceed with the trial for want of proper sanction. But it has been held that the Judge presiding at the Sessions has no power, under the Charter Act, to refer to a Full Bench a point of law raised before the accused was called upon to plead.¹⁷ Reference can be made after the verdict of guilty by the Jury and before delivery of judgment and sentence, the prisoner being in the meantime released on bail to appear, if called upon, to receive judgment.¹⁸ Reference can also be made after verdict and sentence.¹⁹

5. Certificate of the Advocate General.—

Clause 26 of the Letters Patent, though silent as to the procedure to be followed by the Advocate General when he is called upon to grant a certificate, requires that the certificate should reflect the judgment of the Advocate General as it is presumably granted in the interests of justice after a careful consideration of all available materials; it should be in conformity, and not in conflict, with the statement of the Judge who presided at the trial, and it should formulate and give effect to the accused's real grievances. The certificate of the Advocate-General is entitled to respect and whether he grants it after a careful consideration of all available materials or without doing so, once it is granted, the Court has to deal with the case. If that judgment is founded on incomplete materials or inaccurate allegations, its weight is diminished in a corresponding degree. In a case where the error ascribed to the Judge depends on the evidence adduced at the trial, it is desirable that the notes of the evidence, as recorded by the Judge, should be laid before the Advocate-General when he is asked to grant the certificate. The certificate should be granted after he has heard representatives of the prisoner and of the Crown and has carefully considered all the available materials whose accuracy had been verified by Counsel or other responsible persons.²⁰

An objection to the delay in granting the certificate cannot be entertained as the Court cannot direct the Advocate General in the exercise of his discretion.²¹ Inordinate delay

16. (1884) 9 B. 288 (F. B.)

17. Dolegobind Dass (1900) 28 C. 211, 214 : 5 C. W. N. 169.

18. Malony (1863) 1 M. H. C. R. 193. See also Thompson (1867) 1 B. L. R. O. Cr. 1; Elmstone (1870) 7 B. H. C. R. 89; Panchu Das (1920) 47 C. 671, 674 (F. B.) : 24 C. W. N. 501 : 31 C. L. J. 402 : 21 Cr. L. J. 849 : 58 I. C. 929.

19. Willans (1862) 1 M. H. C. R. 31 : 1 Weir 471; Aidrus Sahib (1862) 1 M. H. C. R. 38 : 1 Weir 146, and other cases, *post*.

20. Barendra (1923) 38 C. L. J. 411, 522, 523, 524, 570 (F. B.) : 28 C. W. N. 170 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353; Upendra (1914) 19 C. W. N. 653, 662 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 133.

21. Dayal Jairaj (1866) 3 B. H. C. R. 20.

may be a matter for consideration by the Advocate General at the time when he is called upon to consider whether a certificate should be granted. Art 162 of the Limitation Act has no application to a proceeding under Cl. 26 of the Letters Patent.²²

The Advocate General may amend his certificate on the suggestion of the Court, for incorrectness of facts.²³ Though worded generally as to the points of law certified, it is not to be taken as raising mere abstract points without reference to the facts of the particular case.²⁴

On the presentation of a petition with the Advocate General's certificate, a rule *nisi* is issued, calling upon the Law-officers of the Crown to show cause why the prisoner should not be acquitted.²⁵

The certificate should state the error in the decision of the point or points of law or that the decision should be further considered; the word 'decision' is not limited to the express raising and determination of a point, but the word applies when the matter complained of involves a violation of the law, or a failure to give effect to its injunctions.²⁶ The word includes every mental conclusion on which the judgment or charge is based and not merely matters actually stated at the Bar for the direct decision of the Court. It thus includes directions, misdirections or non-directions to the Jury.²⁷ The Advocate General's judgment not only as regards the error in the point of law decided, but also as regards there being points of law to be decided, is open to be questioned by the High Court, and the Court can declare that the certificate issued by the Advocate General is misconceived or incompetent.²⁸ A 'decision' must mean a conclusion arrived at.²⁹

6. Point of law.—

The expression "point of law" in Cl. 26 means the same thing as matter of law in S. 418 Cr. P. C. It includes such misdirection or non-direction as would permit an appeal against the verdict of a Jury. And misdirection includes not only an error in laying down

22. Padam Prosad (1929) 33 C. W. N. 1121 (S. B.) : 50 C. L. J. 106 ; 30 Cr. L. J. 993 ; A.I.R., 1929 C. 617 : 119 I.C. 193, *per* Rankin, C. J.

23. Pestanji (1873) 10 B. H. C. R. 75, 83, 84. *See also* Upendra (1914) 19 C. W. N. 653, 657 (F. B.) : 21 C. L. J. 377 ; 16 Cr. L. J. 561 : 30 I. C. 113 ; Fateh Chand (1916) 44 C. 477, 502 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945.

24. Muthukumaraswami (1912) 35 M. 397, 468 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896.

25. Shib Chunder (1884) 10 C. 1079.

26. Muthukumarasawmi (1912) 35 M. 397, 469, 470 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896 [referring to O' Hara (1890) 17 C. 642 (F.B.)].

27. Sundaresa (1930) 1930 M. W. N. 249 (F. B.) : *Contra*—Eddy J. But *see* Ramanuja (1934) 58 M. 523 (F. B.) : 36 Cr. L. J. 1398 : A. I. R. 1935 M. 486 : 158 I. C. 662.

28. Ramanuja (1934) 58 M. 523 (F. B.) : 36 Cr. L. J. 1398 : A. I. R. 1935 M. 486 : 158 I. C. 662. *See also* in this connection the article entitled "Cl. 26 of the Letters Patent and the powers of the Advocate General," 1934 M. W. N. *loc.*, and the note "Remedies of accused in Sessions Trial in Presidency Towns" in 67 M. L. J. 154 (Jour).

29. Ramanuja (1934) 58 M. 523 (F. B.) : 36 Cr. L. J. 1398 : A. I. R. 1935 M. 486 : 158 I. C. 662.

the law by which the Jury are to be guided, but also a defect in summing up the evidence or in not summing it up or in summing it up erroneously.³⁰ The "point of law" referred to in Cl. 26 means a point of law submitted to and decided by the trial Court, or any direction as to the law given by him in the course of his summing up to the Jury, and a "decision" must mean a conclusion arrived at.³¹ Where, at a Sessions trial by the High Court, the presiding Judge admitted an alleged inadmissible evidence without there being any objection to its admissibility by the Counsel for the accused, and placed it before the Jury in his charge to them : *Held*, that there was no decision on a point of law within the meaning of Cl. 26.

7. Not a point of law.—

(1) Error in the exercise of a discretion on the part of the Judge, as for instance—
 (a) allowing the jurors to separate after the close of the first day's trial, instead of being kept together under an officer ;³² (b) refusing to reserve a point of law for the opinion of the High Court ;³³ (c) refusing to adjourn a trial ;³⁴ (d) holding a joint trial when not illegal³⁵ are not points of law, and it is not open to a Full Court to interfere with that exercise of jurisdiction upon an application presented in pursuance of a certificate of the Advocate General under the powers entrusted to him by Cl. 26 of the Letters Patent. But a total absence of the exercise of discretion resulting in a denial of justice, and even an improper exercise of it, may, in certain cases, be a question of law within Cl. 26.³⁶

It was held in *Reg. v. Pestanji*,³⁷ that non-direction to the Jury on a point by a Judge is not a matter upon which the Advocate General should grant a certificate. The question was referred to but not decided in *Q. E. v. O' Hara*.³⁸ In *K. E. v. Peary*,³⁹ the Advocate General, on a conviction of kidnapping in the Criminal Sessions of the High Court, granted a *fiat* that the question whether the direction to the Jury was a sufficient direction on the facts and whether certain alleged omissions to direct the Jury did not amount to a misdirection should be further considered by the High Court. *Held*, on a consideration of the facts and circumstances of the case, that there was no misdirection and in that view it was not necessary to decide as to the competency of the fiat. But it has also been held, on the other hand, that if there was no misdirection or other error as certified, the certificate was misconceived, and the High Court has no power to interfere with the conviction and sentence.⁴⁰ *Mookerjee*,

30. Sundaresa (1930) 1930 M. W. N. 249 (F. B.) ;
Contra—Eddy J.

31. Ramanuja (1934) 58 M. 523 (F. B.) : 36 Cr.
 L. J. 1398 : A. I. R. 1935 M. 486 : 158 I. C.
 662.

32. Dayal Jairaj (1866) 3 Bom. H. C. R. 20.

33. Pestanji (1873) 10 Bom. H. C. R. 75.

34. Mc Guire (1900) 4 C. W. N. 433, 439 (F. B.)

35. Charu (1904) 38 C. L. J. 309, 316 (F. B.) : 25
 Cr. L. J. 294 : 76 I. C. 966.

36. Mc Guire (1900) 4 C. W. N. 433, 439 (F. B.) ;
 Narayan (1907) 32 B. 111, 126, 127 (F. B.) :

6 Cr. L. J. 164 ; Muthukumarasawmi (1912)
 35 M. 397, 472 (F. B.) : 13 Cr. L. J. 352 :
 14 I. C. 896.

37. (1873) 10 Bom. H. C. R. 75.

38. (1890) 17 C. 642 (F. B.).

39. (1919) 23 C. W. N. 426 (F. B.) : 20 Cr. L. J.
 300 : 50 I. C. 348.

40. Barendra (1923) 38 C. L. J. 411 (F. B.) : 28
 C. W. N. 170 : 25 Cr. L. J. 1817 : A. I. R.
 1924 C. 257 : 81 I. C. 353. *See also* Ramanuja
 (1934) 58 M. 523 (F. B.) : 36 Cr. L. J. 1398 :
 A. I. R. 1935 M. 486 : 158 I. C. 662.

J., in the above case held that non-direction, when it consists in omission to put material facts or to put the defence to the Jury, is sufficient to cause the Court to quash the conviction, if the Court comes to the conclusion that it is reasonably probable that the verdict of the Jury was affected thereby (This practically assumes that non-direction may be a point of law and can be certified by the Advocate General)⁴¹ (See notes under heading "*Interference on review under Cl. 26 with the verdict of the Jury on the ground of misdirection*", *post*, and notes under the preceding heading).

8. Some Instances of points of law which have been referred or certified for the review of the High Court.—

I. On the question of the Court's jurisdiction.—

(a) On the trial of a British Subject for an offence committed on board a British ship upon the high seas—points of law reserved after verdict of guilty but before judgment,—

"Whether there had been a due trial in the case, and secondly whether there was anything which appeared on the record which would be good in arrest of judgment."⁴²

(b) Where after a verdict of guilty a motion was made in arrest of judgment on the ground of improper admission of evidence and improper exclusion of evidence, but the Judge refused it and passed sentence, one of the points of law reserved,—

"Whether the Judge was right in refusing to arrest judgment".⁴³

(c) The prisoner was indicted under S. 27 of the Indian Railways Act, tried by Jury and was found guilty. The Judge doubted whether he had jurisdiction to try the case, i.e., whether, on the facts of the case, it could be said that the offence was committed in the course of the journey by train to Madras. The point of law referred was,—

"Whether the alleged offence was committed on a journey, within the meaning of S. 35 of Act XVIII of 1862."⁴⁴

(d) The prisoners were charged with setting fire to a British ship on the high seas, and committing a number of offences punishable under the English Statutes and the Indian Penal Code. The Jury found them guilty. The Judge deferred sentence and reserved the following point of law,—

"Whether the prisoners could, in point of law, be convicted on all or any of the charges upon which they had respectively been found guilty, the ship being destroyed by fire on the high seas at a distance of fifty miles from the harbour of Bombay."⁴⁵

(e) Where the prisoner, a Government servant, was committed for trial on charges

41. See also, Charu (1904) 38 C. L. J. 309 (F.B.) :
25 Cr. L. J. 294 : 76 I. C. 966.

42. Thompson (1867) 1 B. L. R. O. Cr. 1.

43. Nabadwip (1868) 1 B. L. R. O. Cr. 15.

44. Malony (1863) 1 M. H. C. R. 193.

45. Elmstone (1870) 7 B. H. C. R. 89.

under Ss. 468, 471 &c I. P. C., and no sanction of the Government was obtained till after committal, the Judge reserved the following point of law,—

“Whether the Court has jurisdiction now to try the accused”.⁴⁶

II. On the question of improper admission of evidence.—

(a) Where certain statements made by the prisoner were admitted by the Court, inspite of objection, the points of law reserved were,—

“(1) Whether certain statements of the prisoner, in answer to Police-constable, were abmissible. (2) Whether certain statements of the prisoner in answer to the Magistrate were admissible.”⁴⁷

(b) The prisoner was tried on several charges and ultimately convicted by Jury on two charges of committing criminal breach of trust in respect of two different sums of money on two different dates. In respect of one of these sums, a receipt signed by the prisoner was admitted in evidence against the accused on the charge of criminal breach of trust in respect of that sum. The Judge convicted the prisoner on the two counts, but on the application of the Counsel for the prisoner reserved for the consideration of the High Court,—

“Whether the document marked as Exhibit E was properly admitted as evidence against the accused.”⁴⁸

(In the above case, the High Court held the receipt Exhibit E not admissible in evidence ; and the conviction on that head of the charge in which it was admitted was set aside, but the conviction on the other head was confirmed).

(c) Where a prisoner, on his arrest, made a statement in the nature of a confession which was reduced into writing by one of the Inspectors in whose custody the prisoner was and was subsequently signed and acknowledged by the prisoner in the presence of the Deputy Commissioner of Police at the Police Office, the Deputy Commissioner receiving and attesting the statement in his capacity as Magistrate and Justice of the Peace. This statement was admitted in evidence at the trial inspite of the objection by the prisoner’s Counsel, and the Judge refused to reserve the point under Cl. 25 of the Letters Patent. The Advocate General, on a special case being submitted to him, granted a certificate under Cl. 26 of the Letters Patent,—

“That the point of law should be further considered”.⁴⁹

(d) When on a trial for murder, the Judge read to the Jury statements (which had not been admitted in evidence) by two witnesses for the prosecution purporting to have been taken under S. 364 Cr. P. C., for the purpose of showing that they were not accomplices, the

46. Morton (1884) 9 B. 289 (F. B.)

47. Nabadwip (1868) 1 B. L. R. O. Cr. 15,

48. Navroji (1872) 9 B. H. C. R. 358.

49. Hurribole (1876) 1 C. 207 : 25 W. R. 36,

Jury found the accused guilty and the Judge sentenced him to death : the Advocate General gave a certificate to the following effect,—

“That the learned Judge ought not to have referred to the said examination, for that it was not admitted or admissible in evidence.”⁵⁰

III. On the question of improper exclusion of evidence.—

(a) Where on an objection being taken that the case is wrongly before the Court unless evidence is given that the High Court duly directed the preliminary investigation to be made by a Moffasil Magistrate who committed the case to the High Court, and the Court held that it was not necessary to have that evidence : The point of law reserved was,—

“Whether the Judge was right in holding that it was not necessary that evidence should be given of any proceeding having been had by the High Court, duly directing the preliminary investigation to be made by the Magistrate.”⁵¹

(*Held*, in the above case, that the High Court being a Court of Superior Jurisdiction, the want of jurisdiction is not to be presumed, but the contrary).

(b) Two prisoners were jointly tried on a charge of murder. One of the prisoners, when questioned, made a statement to a Police-officer, “I have killed a man, and the other has run away.” The Counsel for the other prisoner wanted to prove this statement through a witness for the prosecution in cross-examination. The Counsel for the other prisoner objected, and the Judge upheld the objection. The Jury ultimately returned a verdict of guilty against both the prisoners. On the motion, however, of the Counsel, the Judge reserved and referred to the High Court under Cl. 25 of the Letters Patent and S. 101 of the High Court’s Criminal Procedure Act X of 1875 (now S. 434 Cr. P. C.), the following point of law,—

“Whether the evidence of the first prisoner’s confession had been rightly rejected.”⁵²

(*Held*, in the above case, that S. 25 of the Evidence Act does not preclude one accused person from proving a confession made to a Police-officer by another accused person tried jointly with him ; such a confession is not to be received or treated as evidence against the person making it, but simply as evidence on behalf of the other, and the Judge should direct the Jury to that effect).

IV. On the question of irregularity in the method of trial.—

(a) In a trial under S. 467 I. P. C., which lasted for two days, at the end of the first day’s hearing the Judge in the exercise of his discretion allowed the jurors to separate and disperse for the night and to retire to their several and respective houses and homes, without any person or persons having been sworn, affirmed or directed to keep them together until the said Court should resume the hearing of the said trial upon the following morning. The

50. O’ Hara (1890) 17 C. 642 (F. B.)

52. Pitambar (1877) 2 B. 61.

51. Nabadwip (1868) 1 B. L. R. O. C. 15.

Jury convicted the prisoners and the Judge passed sentences on them. The point of law certified by the Advocate General was,—

“Whether by reason of the separation and dispersion of the jurors, the trial was not vitiated, and whether the said convictions and sentences were not illegal in consequence and ought to be set aside and reversed.”⁵³

(*Held*, in the above case, that the Judge had a discretion in the matter, the offence being, under the practice then prevailing, not a felony or treason but a misdemeanour, and that the exercise of the Judge’s discretion was not a matter to be reviewed by the High Court under Cl. 26 of the Letters Patent, there being no error in any point of law).

(b) Addition of a new charge, at the close of the case for the prosecution, on which no plea was taken.⁵⁴

V. On the question of legality of the sentence.—

Illegality of the sentence is by itself a good ground for certificate.⁵⁵

VI. On the question of defect in the charges.—

(a) On the trial of a prisoner on charges under Ss. 415 & 420 I. P. C., an objection was taken at the close of the case for the prosecution that the indictment contained no allegation that the money obtained by cheating was the property of the prosecution, and the Judge amended the charge accordingly as there was evidence on the point. After the verdict and sentence passed by the Judge, the points of law reserved were,—

“(1) Whether the objection was validly taken at that stage; and (2) if the objection was valid, whether the Court had power to amend the indictment”.⁵⁶

(b) On a charge of intentionally giving false evidence, under Ss. 191 and 193 I. P. C., an objection was taken at the close of the case for the prosecution that the indictment was wholly defective and bad on several grounds mentioned. The Judge over-ruled the objections, took the verdict of the Jury and sentenced the prisoner, and then referred the following point amongst others,—

“Whether the indictment was defective as it did not allege or show that the false statement made by the prisoner was material to the matter of the judicial proceeding in which such statement was made”.⁵⁷

VII. On the question of misdirection to the Jury.—

(1) The certificate of the Advocate General stated,—“It has been represented to me that the said Justice did, in the presence and hearing of the Jury, refuse to reserve for the opinion of the High Court, the point of law following, that is to say,—

“Whether instigation to murder by means of sorcery is an offence or not, and

53. Dayal Jairaj (1866) 3 Bom. H. C. R. 20.

54. Appa Subhana (1884) 8 B. 200.

55. Yed (1866) 1 Ind. Jur. (N. S.) 424.

56. Willans (1862) 1 M. H. C. R. 31 : Weir 471.

57. Aldrus (1862) 1 M. H. C. R. 38 : 1 Weir 146

did not instruct the Jury in his summing up that instigation to murder by means of sorcery was not an offence, but, on the contrary, did tell the Jury and did say in their presence and hearing, that there was no point of law in the case to be reserved for the opinion of the said High Court, and whereas it has been further represented to me (on behalf of the prisoners) that the said rulings and proceedings of the said Justice constitute error or errors in the decision of a point or points of law &c.”⁵⁸

(*Held*, in the above case, that non-direction by a Judge is not a matter upon which the Advocate General should grant a certificate under Cl. 26 of the Letters Patent).

(2) On a trial for murder, two approvers, to whom pardon was tendered, gave evidence for the prosecution. The Judge, in his address to the Jury, said, with reference to one of these witnesses, that the Jury were not to convict upon the evidence of this witness if satisfied that he was an accomplice and uncorroborated, but coupled the direction with a strong expression of opinion that he was not an accomplice. The accused was found guilty by the Jury and the Judge sentenced him to death. On a certificate of the Advocate General, the following point of law was referred for further consideration,—

“That the Judge should have directed the Jury that he was an accomplice and his evidence should be treated as that of an accomplice”.⁵⁹

(*Held*, in the above case, that the Judge’s direction constituted a misdirection in fact, though not in form, calculated seriously to prejudice the prisoner’s case. Referring to the decision in *Reg. v. Pestanji*, *ante*, the High Court observed that whether an omission to advise the Jury properly on the credibility of an accomplice’s evidence according to the prevailing practice would be ground for review under Cl. 26 of the Letters Patent, need not be decided in that case.⁶⁰ The High Court then reviewed the case on the evidence and ultimately set aside the conviction and sentence).

(3) As to certificate granted on the ground of misdirection, *see also* the case noted at the foot-note.⁶¹

9. Statement of the Judge as to what has taken place at the trial.—

The statement of the Judge, who presides at the trial, whether it be in a Criminal or a Civil case, is, as to what has taken place at the trial, conclusive. Neither the affidavits of by-standers nor of jurors, nor the notes of Counsel, nor of short-hand-writers, are admissible to controvert the notes or statements of the Judge.⁶² When the Court is called upon to review a case under Cl. 26 of the Letters Patent, it will accept as unquestionable the statement of the

58. *Pestanji* (1873) 10 Bom. H. C. R. 75.

59. *O’ Hara* (1893) 17 C. 642 (F. B.)

60. *See* in this connection *Muthukumarasawmi* (1912) 35 M. 397 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896.

61. *Shib Chunder* (1884) 10 C. 1079.

62. *Pestanji* (1873) 10 Bom. H. C. R. 75 : *Upendra* (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; *Fateh Chand* (1916) 44 C. 477 (F. B.) : 21 C.W.N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945 ; *Beauchamp* (1909) 2 Cr. A. R. 40.

trial Judge as to what actually took place before him in Court.⁶³ According to the well-recognized practice which prevails wherever members of the English Bar practise, a Counsel should never file an affidavit in which he is appearing professionally. It not only hampers his freedom of action as an advocate, but he thereby gives up his dignified position of detachment as an advocate and lowers himself.⁶⁴ In a case of alleged misdirection, the High Court is bound to give all due weight to the statement of the learned Judge himself as to what he really said to the Jury.⁶⁵ Mere misunderstanding on the part of the by-standers in Court, or Counsel engaged in a case, of expressions used by a Judge in charging a Jury (where it appears that the expressions used by the Judge were such as ought to have been understood by any reasonable man, having regard to what was proved in the case, and what was said to the Jury afterwards) will not constitute misdirection.⁶⁶

10. Review under Cl. 26—Successive Stages.—

Under Clause 26 of the Letters Patent, the initial step is for the trial Judge to reserve a point of law or for the Advocate General to grant a certificate. The successive stages of the process are :—(1) the Court reviews the entire case or such part of it as may be necessary ; (2) the Court finally determines the point or points of law reserved or certified ; (3) the Court thereupon alters the sentence passed by the trial Court ; and (4) the Court passes such judgment and sentence as shall seem right to the Court. As regards the first stage, the Court reviews the case in whole or in part with a view to decide the point of law reserved or certified. As regards the second stage, what is finally determined is the point of law reserved or certified. As regards the third stage, where the Court can alter the sentence passed by the trial Court, the term “thereupon” means “upon final determination of the point of law reserved or certified”. If no error is established, the reason why the prisoner can claim an alteration of the sentence disappears. If the third stage has been reached and the Court is in a position to exercise the full power and authority vested in it to alter the sentence, the Court is competent to pass such judgment and sentence as to the Court shall seem right.⁶⁷

The phrase “to review the case,” as used in Cl. 26, applies as much where a point of law is reserved by the trial Judges as where the Advocate General has given a certificate, though that certificate was granted after great delay.⁶⁸ The word “thereupon” means that the point is in favour of the prisoner.⁶⁹

63. Barendra (1923) 38 C. L. J. 411 (F. B.) : 28 C. W. N. 170 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353 ; Upendra (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; Fateh Chand (1916) 44 C. 477 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945.

64. Mashar Khan (1927) 29 Cr. L. J. 220 : A. I. R. 1928 L. 276 : 107 I. C. 108.

65. Shib Chunder (1884) 10 C. 1079,

66. Ibid.

67. Barendra (1923) 38 C. L. J. 411 (F. B.) : 28 C. W. N. 170 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353, *Per Mookerjee, J.*

68. Padam Prosad (1929) 33 C. W. N. 1121 (S. B.) : 50 C. L. J. 106 : 30 Cr. L. J. 993 : A. I. R. 1929 C. 617 : 119 I. C. 193, *per Rankin, C. J.*

69. Padam Prosad (1929) 33 C. W. N. 1121 (S. B.) : 50 C. L. J. 106 : 30 Cr. L. J. 993 : A. I. R. 1929 C. 617 : 119 I. C. 193 *per C. C. Ghose J.*

At the hearing of a review under Cl. 26, it is not open to the accused to argue any question of law not raised in the certificate of the Advocate General ; Cl. 26 of the Letters Patent does not open up the whole case as though on appeal.⁷⁰ Where there is no misdirection or other error as certified by the Advocate General, his certificate is misconceived and the High Court has no power to interfere ; it is not within its power to re-open the case and express any opinion on the merits.⁷¹ Review under Cl. 26 is not by way of appeal or revision.⁷² The Court, being one of Error and not of Appeal, can only interfere when the trial is vitiated by error in law and not otherwise, and it cannot therefore question the findings of the trial Court on the evidence properly before it ; e.g., voluntariness of confession, credibility of witness &c.⁷³ In *Q. E. v. Appa*⁷⁴ where the point of law raised was as to the legality of adding a new charge at the close of the trial and it was held that it was not justified by law, the High Court observed that it was an error in form and not in substance ; and held that S. 537 Cr. P. C., would justify its non-interfering with the conviction, that Section applying to the High Court acting as a Court of Review under S. 434 and the Court is a Court of Reference and Revision and is treated as such from the heading of Chapter XXXII.

11. Right to begin.—

The prisoner's Counsel has the right to begin at the hearing of the review,⁷⁵ and has a right to reply.⁷⁶ Where on the application of Counsel for the prisoner, a point of law has been reserved for the decision of the High Court under S. 434 Cr. P. C., the prisoner's Counsel has the right to begin.⁷⁷

When a point or points of law have been reserved or have been certified by the Advocate General as erroneously decided or as worthy of further consideration, and the Court on review holds on the point of law in favour of the accused, it has been the practice of the Courts to consider the whole case on the evidence and to pass such sentence as shall seem right.⁷⁸ S. 537 Cr. P. C., has no application to a case reviewed under Cl. 26 of the Letters Patent.⁷⁹ (See notes under the next heading).

70. Muthukumarasawmi (1912) 35 M. 397 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896 [followed in S. P. Ghosh (1915) 16 Cr. L. J. 676 : 30 I. C. 724].

71. Upendra (1914) 19 C. W. N. 653 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; Shib Chunder (1884) 10 C. 1079 ; Mackay (1925) 53 C. 350, 362, 365 (F. B.) : 30 C. W. N. 276 : 43 C. L. J. 310 : 27 Cr. L. J. 385 : A. I. R. 1926 C. 470 : 93 I. C. 33 ; Ramanuja (1934) 58 M. 523 (F. B.) : 36 Cr. L. J. 1398 : A. I. R. 1935 M. 486 : 158 I. C. 662.

72. Fateh Chand (1916) 44 C. 477 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945.

73. Muthukumarasawmi (1912) 35 M. 397, 435, 443, 445 (F. B.) : 13 Cr. L. J. 352 : 14 I. C.

896. But see Narayan (1907) 32 B. 111, 124 (F. B.) : 6 Cr. L. J. 164.

74. (1884) 8 B. 200. But see Fateh Chand (1916) 44 C. 447 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945.

75. Dayal Jairaj (1866) 3 Bom. H. C. R. 20.

76. Panchu Das (1920) 47 C. 671 (F. B.) : 24 C. W. N. 501 : 31 C. L. J. 402 : 21 Cr. L. J. 849 : 58 I. C. 929.

77. Appa Subhana (1884) 8 B. 200.

78. Fateh Chand (1916) 44 C. 477 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945, per Mookerjee, J. ; Panchu Das (1920) 47 C. 671 (F. B.) : 24 C. W. N. 501 : 31 C. L. J. 402 : 21 Cr. L. J. 849 : 58 I. C. 929.

79. Fateh Chand (1916) 44 C. 477 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J.

12. Re-trial.—

Under Clauses 25 and 26 of the Letters Patent, the case reserved or certified should be finally decided on review and not committed for re-trial.⁸⁰

For the purpose of reviewing the whole case, the High Court can go into evidence which can be gathered from the notes of the trial Judge and, if necessary, from the Judge himself.⁸¹ The power of going into the evidence is given by the words "pass such judgment" and not "review the case"⁸² (See notes under the next heading).

On a question of misdirection, the High Court can act on the memorandum of the summing up prepared by the Judge for the case, supplemented by his statements and those of Counsel at the hearing.⁸³ It is the duty of the Prosecuting Counsel to take notes of the Judge's charge to the Jury.⁸⁴ Necessity for full and accurate short-hand notes of the proceedings at the High Court Sessions trial was emphasized by Mookerjee, J. in *E v. Barendra*.⁸⁵ The Privy Council observed in a case from Ceylon that it is desirable that there should be available for the tribunal dealing with the reference a full note of the Judge's summing up.⁸⁶ In the event of a discrepancy between the Judge's notes and those of the short-hand reporter the former will generally be preferred.⁸⁷ In cases where an application is made to the Government Advocate for a fiat, which may happen in any case, it is essential that there should be an official record of the charge that the Judge delivered to the Jury; the practice prevalent in the Rangoon High Court of taking short-hand notes only in cases of murder was deprecated.⁸⁸

The Review Court refused to accept the certificate of the majority of the Jury that they would have acquitted but for the confession improperly admitted.⁸⁹

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| <p>385 : 38 I. C. 945, <i>per</i> Mookerjee, J. <i>But see</i> Appa Subhana (1884) 8 B. 200.</p> <p>80. Panchu Das (1920) 47 C. 671 (F. B.) : 24 C. W. N. 501 : 31 C. L. J. 402 : 21 Cr. L. J. 849 : 58 I. C. 929 ; Fateh Chand (1916) 44 C. 477 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945 ; Barendra (1923) 38 C. L. J. 411 (F. B.) : 28 C. W. N. 170 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353 ; Hurribole (1876) 1. C. 207 : 25 W. R. 36 ; O' Hara (1890) 17 C. 642 (F. B.). <i>See also</i> Navroji (1872) 9 Bom. H. C. R. 358 ; Pitambar (1877) 2 B. 61 ; Narayan (1907) 32 B. 111 (F. B.) : 6 Cr. L. J. 164 ; Puttan Hassan (1935) 38 Bom. L. R. 19 (F. B.) : 37 Cr. L. J. 366 : A. I. R. 1936 B. 52 : 160 I. C. 1060.</p> <p>81. Hurribole (1876) 1. C. 207 : 25 W. R. 36 ; O' Hara (1890) 17 C. 642 (F. B.) ; Navroji (1872) 9 Bom. H. C. R. 358, 394,</p> | <p>82. Muthukumarasawmi (1912) 35 M. 397, 515 516 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896.</p> <p>83. Pestanji (1873) 10 B. H. C. R. 75, 81 ; Upendra (1914) 19 C. W. N. 653, 656, 658, 660, 662, 663 (F. B.) : 21 C. L. J. 377 : 16 Cr. L. J. 561 : 30 I. C. 113 ; Peary (1919) 23 C. W. N. 426, 429 (F. B.) : 20 Cr. L. J. 300 : 50 I. C. 348.</p> <p>84. Peary (1919) 23 C. W. N. 426 (F. B.) : 20 Cr. L. J. 300 : 50 I. C. 348.</p> <p>85. Barendra (1923) 38 C. L. J. 411 (F. B.) 28 : C. W. N. 170 : 25 Cr. L. J. 817 : A. I. R. 1924 C. 257 : 81 I. C. 353.</p> <p>86. Albert Godamuni (1932) 64 M. L. J. 290 (P. C.) : 34 Cr. L. J. 550 : A. I. R. 1933 P. C. 7 : 143 I. C. 224.</p> <p>87. Beauchamp (1909) 2 Cr. A. R. 40.</p> <p>88. U. Ba. Thein (1930) 8 R. 372 : 32 Cr. L. J. 23 : A. I. R. 1930 R. 351 : 127 I. C. 730.</p> <p>89. Hurribole (1876) 1 C. 207 : 25 W. R. 36.</p> |
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13. Applicability of S. 167 of the Evidence Act to a review under Cl. 26 of the Letters Patent, when a certain piece of evidence is held to have been improperly admitted or rejected.—

S. 167 of the Evidence Act says :—"The improper admission or rejection of evidence shall not be a ground of itself for a new trial or reversal of any decision in any case, if it shall appear to the Court before which such objection is raised that independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

The words of this Section are identical with those of S. 57 of Act II of 1855, but the latter Act contained no express words making it applicable to all Courts whatever, and it might be doubted whether all its provisions were intended to be enforced in all proceedings, criminal as well as civil, though the following was held in *Reg. v. Ramswami Mudliar* :—⁹⁰ That S. 57 of the above Act was applicable to the High Court on its appellate Jurisdiction in appeals from the sentence of the Sessions Judge where the prisoner had been tried and convicted by a Jury ; that the Appellate Court, where it found that illegal evidence had been admitted, should consider whether it was such as was likely to have exercised a prejudicial influence on the minds of the Jury ; that if the Court was of opinion that it was so, it would treat the case as if it had been tried by a Sessions Judge with the aid of assessors ; and that if the evidence (after omitting that portion of it which should not have been admitted) was sufficient to sustain the verdict, the conviction would be upheld ; but that, in exceptional cases, where the evidence was of such a character as to suggest the consideration that its real value could not fairly be appreciated, except by a Court which had heard that evidence given, a new trial would be directed.

In *Reg. v. Navroji*,⁹¹ the applicability of S. 167 to such cases was first raised, but the question was only fully gone into by one of the Judges, Bayley, J., and was not made a ground of their decisions by Sargent, C. J., and Green, J., though they adverted to it. Bayley, J., gave a strong opinion that the Section was not applicable to such a case. The facts of that case were that accused was charged, amongst others, with offences of committing criminal breach of trust in respect of two sums of money on two different dates and tried and convicted at the High Court Sessions on these two counts. In support of the charge on one of the two counts, a receipt for the sum of money misappropriated, signed by the accused, was admitted in evidence against him. The Judge, on the application of the Counsel for the accused, reserved for the consideration of the High Court, whether that receipt was legally admissible against the accused. The matter came up for review before the aforesaid three Judges under S. 26 of the Letters Patent. All the three Judges held that the receipt was improperly admitted in evidence ; but by a majority it was held (Bayley, J., *dissentiente*) that (independently of S. 167) the High Court in considering a point of law reserved under Cl. 25 of the Letters Patent, where it is of opinion that the evidence has been improperly admitted as to one of two heads of charge of which a prisoner stands convicted

90. (1869) 6 Bom. H. C. R. 47.

91. (1872) 9 Bom. H. C. R. 358.

(the two heads of charge relating to two distinct and separate offences) and that the conviction on such head of charge is bad, has power to review the whole case, and, if it appears that the evidence improperly admitted could not reasonably be supposed to have influenced the Jury as to the latter head of the charge, ought not to set aside the conviction on that head of the charge, but should proceed to pass judgment and sentence on it. *Semble*—That S. 167 of the Evidence Act applies to criminal trials by Jury in the High Court. Bayley, J., on the contrary, held that Cl. 26 did not give the High Court power to review the evidence further than was necessary to decide the point or points of law reserved for the consideration of the High Court. He observed : “The right of appeal is by Clause 25 expressly negatived ; and were we to review the evidence for the purpose, not of deciding the point of law but of seeing whether there is other evidence sufficient to support the conviction, we should, in effect, supersede, by our judgment on the facts, the verdict already given by the special Jury.”

The matter next came up for consideration in the case of *Q. v. Hurribole Chunder*.⁹² In that case the accused was tried by a Jury at the High Court Sessions and was found guilty and convicted and sentenced. Certain statement of the accused was allowed to be put in evidence against him, inspite of objection, and the Judge refused to reserve the point under Cl. 25 of the Letters Patent. On a certificate granted by the Advocate General, the question of admissibility came up for review in the High Court under Cl. 26 of the Letters Patent. It was held that the statement was improperly admitted. Then came up the question what should be effect of this improper admission of evidence on the proceedings. Both the Judges (Garth, C. J., and Pontifex, J.) held, that under S. 26 of the Letters Patent, the High Court has a right either to quash or to confirm the conviction, and for that purpose to review the whole case upon the evidence properly received, which evidence can be gathered from the trying Judge's notes,⁹³ and, if necessary, from the Judge himself. Garth, C. J., was also of opinion that S. 167 of the Evidence Act also applied. But Pontifex, J., while agreeing with the Chief Justice that S. 167 applies to criminal trials, expressed doubt whether, if the High Court were to proceed upon that Section alone, it would be proper to consider the sufficiency or insufficiency of the evidence in relation to the verdict. (The High Court ultimately went through the evidence, and upheld the conviction. A certificate by a majority of the Jury who tried the case, to the effect, that if the confession had not been in evidence, they would have given a verdict of acquittal, was tendered, but was rejected by the Court).

In *Imp v. Pitamber*,⁹⁴ the point of law reserved and referred to the High Court was whether a certain piece of evidence was rightly excluded, and the High Court held that it was improperly excluded. The accused were convicted by the Jury, and the question then arose whether the admission of this piece of evidence would have varied the result, and whether the

92. (1876) 1 C. 207 : 25 W. R. 36 [The Judgment on the evidence is reported in the Weekly Reporter].

93. In *O' Hara* (1890) 17 C. 642 (F. B), the Judges forming the Full Bench similarly

proceeded to deal with the case on the evidence as it appeared from the notes of the trying Judge.

94. (1877) 2 B. 61.

High Court could go into the merits and pass a decision now. Westropp, C. J. (with him Sargent and Atkinson, JJ.) after referring to the two preceding cases, observed as follows :—

“Apart from those two cases, i. e., if the question were now raised for the first time, we think that, by Cl. 26 of the Letters Patent, 1865 and S. 101 of the High Court Criminal Procedure Act X of 1875 (now S. 434 Cr. P. C.) the power of so reviewing the whole case, on a point of law such as the admissibility of rejected evidence when reserved, is expressly conferred on this Court. We are clearly of opinion that S. 167 of the Evidence Act, 1872, is applicable to criminal as well as to Civil cases, and is so to criminal cases, whether or not the trial has been laid before a Jury, and that the expression in that Section, ‘the Court before which such objection is raised’, includes the Reviewing or Appellate Court. That the 167th Section applies to Criminal as well as to Civil Courts, is, we think, satisfactorily established by the 1st section, which renders the Act applicable ‘to all judicial proceedings in or before any Court, including Courts Martial’ with certain exceptions not material in this case ; and by the 3rd section, which declares that the word ‘Court’ includes all Judges and Magistrates.” The High Court then went into the merits and held that the admission of this evidence could not properly have varied the result in any respect, and the conviction was allowed to stand. The Court, after finally determining the points of law, has to look to S. 167 Evidence Act for the further course to be followed.⁹⁵

All the above cases were referred to by Mookerjee, J. in *E. v. Fateh Chand*⁹⁶ and he held that when the Court on review holds the point of law in favour of the accused, it has been the uniform practice of the Courts to consider the whole case on the evidence and to pass such sentence as shall seem right. And in *E. v. Panchu*⁹⁷ it has been held that it is incumbent on the High Court in cases reserved or certified, to investigate whether, independently of the evidence objected to and admitted, there was sufficient evidence to justify the verdict of the Jury ; and that in examining the evidence the Court must consider, whether it can, with reasonable certainty, hold that, even if the evidence improperly admitted had been excluded, the Jury, upon the residue of the evidence, would have brought in a verdict of guilty. Mookerjee, J. in the above case further observed that the Judicial Committee did not by their decision in 25 M. 61 over-rule by implication the series of cases in Calcutta and Bombay where the High Court, in cases reserved or certified, reviewed the evidence and determined the question of guilt of the accused. The decision of the Judicial Committee must be limited to cases of the type then before them, namely, where the trial had been conducted in a mode entirely prohibited by law, and cannot be extended to cases where evidence had been erroneously received or improperly rejected.⁹⁸

95. Narayan (1907) 32 B 111, 131 (F. B.) : 6 Cr. L. J. 164 [followed in *Muthukumarasawmi* (1912) 35 M 397, 425, 426 (F. B.) : 13 Cr. L. J. 352 : 14 I. C. 896] ; *Ramanuja* (1934) 68 M. L. J. 93. Sup (S. B.) : 37 Cr. L. J. 64 : A. I. R. 1935 M. 793 : 159 I. C. 240.

96. (1916) 44 C. 477 (F. B.) : 21 C. W. N. 33 : 24 C.L.J. 400 : 18 Cr. L.J. 385 : 38 I.C. 945.

97. (1920) 47 C. 671 (F. B.) : 24 C. W. N. 501 : 31 C. L. J. 402 : 21 Cr. L. J. 849 : 58 I. C. 929.

98. Mookerjee, J. himself left this point undecided in *Fateh Chand* (1916) 44 C. 477, 505 (F. B.) : 21 C. W. N. 33 : 24 C. L. J. 400 : 18 Cr. L. J. 385 : 38 I. C. 945. *See also* *Narayan* (1907) 32 B. 111, 135 (F.B.) : 6 Cr. L. J. 164.

There is, however, some difference of opinion, as to whether the High Court in reviewing the whole case can decide questions of fact such as the admissibility of a confession, on the ground of voluntariness, which point was not reserved or certified, though there is no difference where the question is as to the credibility and weight of a witness's testimony.⁹⁹

14. Interference, on Review under Cl. 26, with the verdict of the Jury on the ground of Misdirection.—

When the High Court holds that there has been a serious misdirection calculated to prejudice the accused, it can go into the evidence furnished by the trial Judge's notes and see whether there has been a failure of justice, and, if satisfied on that point, can set aside the verdict and the conviction.¹⁰⁰ It is only when a failure of justice is occasioned by a defective or erroneous summing up to the Jury that the High Court can set aside the conviction.¹⁰¹ And it has been held by Mookerjee, J., in *E. v. Barendra*,¹⁰² that non-direction, when it consists in omission to put the material facts or to put the defence to the Jury, is sufficient to cause the Court to quash the conviction, if the Court comes to the conclusion that it is reasonably probable that the verdict of the Jury was affected thereby. The accused must establish that there was a material misdirection or an omission to direct on vital points.¹⁰³ In considering whether a Judge has misdirected the Jury, the tenor and general effect of the whole summing up should be looked at, and, if upon the whole summing up, the Court is of opinion that substantially the proper direction has been given to the Jury, it will not interfere, though the Judge has omitted to direct the Jury expressly on some important point.¹⁰⁴ Clause 26 of the Letters Patent does not entail that whenever any misdirection is found to exist the Court has no option but to set aside the verdict. S. 537 C. P. C., does not apply to a case dealt with under Cl. 26. But the High Court ought to apply to such a case the principle which underlies that Section, that is, that where there has been no illegality in the mode of trial, but some irregularity in the process of trial, the High Court is not entitled to set aside the verdict or judgment unless it is satisfied that that irregularity has led to a miscarriage of justice, or has prejudiced the accused. Cl. 26 contemplates a final disposal of the case by the High Court and there can be no new trial. It is open to the High Court to consider, not so much what effect the misdirection has upon the minds of this Court sitting in place of a Jury, but what the effect of the misdirection was or may have been upon the minds of the Jury which tried the case; and in so doing, the Court should assume that the Jury was a reasonably competent Jury, though the Court must remember that a Jury consists of laymen, and the misdirection may have more effect upon the minds of laymen than upon the mind of a trained Judge. In order to determine that question it is, of course, necessary

99. Narayan (1907) 32 B. 111, 120, 124, 127 (F. B.): 6 Cr. L. J. 164; Muthukumarasawmi (1912) 35 M. 397, 435, 443, 445 (F. B.): 13 Cr. L. J. 352; 14 I. C. 896.
100. O' Hara (1890) 17 C. 642 (F. B.).
101. Charu (1904) 38 C. L. J. 309 (F. B.): 25 Cr. L. J. 294; 76 I. C. 966.

102. (1923) 38 C. L. J. 411 (F. B.): 28 C. W. N. 170; 25 Cr. L. J. 817; A. I. R. 1924 C. 257; 81 I. C. 353.
103. Peary (1919) 23 C. W. N. 426, 429, 430 (F. B.): 20 Cr. L. J. 300; 50 I. C. 348.
104. Pestanji (1873) 10 Bom. H. C. R. 75.

to consider the evidence on the record.¹⁰⁵ Where there was a misdirection and it appeared that the accused was prejudiced thereby and the Advocate General granted a certificate, *held*, that the conviction must be set aside.¹⁰⁶ Where the accused was prosecuted for offences under Ss. 406 and 477 I. P. C., but it appeared that the Judge had misdirected the Jury on the question of law, namely, as to the ingredients forming the offence; *held*, that it was a fit case for interference under Cl. 26, and the accused was acquitted.¹⁰⁷

15. Alter the sentence.—

The High Court may reduce the sentence.¹⁰⁸ It can alter an illegal sentence and pass the proper legal one.¹⁰⁹ The expression "alter the sentence" includes setting it aside; the High Court on review can not merely reduce the sentence, but has power to set aside the conviction.¹¹⁰

16. Pass such judgment and sentence.—

When the sentence was deferred, pending the result of the reference, the Review Court, on upholding the conviction, directed it to be passed.¹¹¹ Where the trial was postponed pending the reference and the High Court held that the Judge may accept the commitment under S. 532 Cr. P. C., it directed that the presiding Judge of the Court of Session may proceed with the trial if he considers that the accused has not been prejudiced.¹¹²

105. Puttan Hassan (1935) 38 Bom. L. R. 19 (F. B.) : 37 Cr. L. J. 366 : A. I. R. 1936 B. 52 : 160 I. C. 1060.

106. Padam Prosad (1929) 33 C. W. N. 1121 (S. B.) : 50 C. L. J. 106 : 30 Cr. L. J. 993 : A. I. R. 1929 C. 617 : 119 I. C. 193.

107. Susen Behary (1930) 58 C. 1051 (F. B.) : 35 C. W. N. 425 : 32 Cr. L. J. 836 : A. I. R. 1931 C. 184 : 132 I. C. 145,

108. Narayan (1907) 32 B. 111 (F. B.) : 6 Cr. L. J. 164.

109. Yed (1866) 1 Ind. Jur (N. S.) 424.

110. Sundaresa (1930) 1930 M. W. N. 249 (F. B.).

111. Appa Subhana (1884) 8 B. 203.

112. Morton (1884) 9 B. 288 (F. B.).

CHAPTER III.

Appeals to the Privy Council.

Appeals to the Privy Council.—

Clause 41 of the Letters Patent of 1865 of the Calcutta High Court enacts as follows :—

“And we do further ordain that, from any judgment, order or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of Original Criminal Jurisdiction, or in any criminal case where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the persons aggrieved by such judgment, order, or sentence to appeal to us, our heirs or successors in Council, provided the said High Court shall declare that the case is a fit one for such appeal and under such conditions as the said High Court may establish or require, subject always to such rules and orders as we may, with the advice of our Privy Council, hereafter make in that behalf.

There are corresponding Clauses in the Letters Patents of the High Courts. Where there is no provision like Cl. 41 of the Letters Patent, 1865, applicable, no Indian Court can grant leave to appeal to His Majesty in Council. In such cases, the remedy is by an application for special leave to His Majesty in Council.

As His Majesty the King is supreme over all persons and Courts within his dominions, a right of appeal in all cases, Civil and Criminal, to the King in Council exists from the highest Court of each separate colony, province, state or possession, whether it be a Court of Error or not, except so far as the prerogative in this behalf has been expressly surrendered.

Criminal proceedings are, in practice, reviewed, only if it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done.

The Judicial Committee do not, as a rule, advise His Majesty to grant appeals in criminal cases, except where questions of great and general importance, likely to occur often, are raised and where the due and orderly administration of the law is shown to be interrupted or diverted into a new course, which might create a precedent for the future, and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant, in pursuance of the leave obtained by the appellant from the Court appealed from, or by reason of special leave granted by the Judicial Committee. The latter appeals arise, either where the Court below does not possess power to grant leave, or where leave to appeal has been refused by the Court below, or where leave to appeal was granted on some special point and the appellant wishes to raise points not included in the leave to appeal. But whether leave

to appeal is granted by the Court appealed from or by the Judicial Committee, the answer to the question, whether the case is a fit one for appeal, depends on the same considerations ; the grant of the leave to appeal is a step ancillary to the determination of the appeal, and the principles which regulate the ultimate decisions of the appeal cannot be ignored when an application for leave is examined.¹

Where a petition for leave to appeal to the Privy Council is made in a case where a point of law has been reserved for the decision of the High Court, there can be no doubt that the petition is competent.²

In the case of *Ibrahim v. Rex*³ the Judicial Committee observed :—

“Their Lordships’ practice has been repeatedly defined. Leave to appeal is not granted “except where some clear departure from the requirements of justice” exists : *Riel v. Reg* (1883) 10 App. Cas 675 : nor unless “by a disregard of the forms of legal process or some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done” : *Dillets’ Case* (1887) 12 App. Cas. 459. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing. *Riel’s Case* (1883) 10 App. Cas. 675 ; *Exparte Deeming* (1892) A. C. 422. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself ; and conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice : *Exparte Macrea* (1893) A. C. 346. There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future.” *Reg v. Bertrand* (1867) L. R. 1 P. C. 520.”

The case of *Barendra*, (ante) was taken up to the Privy Council for special leave and there it was held that where, in the case of a prisoner who was tried and convicted at the Criminal Sessions in a High Court the trial Judge did not reserve any point of law for consideration by the High Court, but on the certificate of the Advocate General under Cl. 26 certain points were considered by the High Court and the High Court had held that there had been no error of law and that the conviction and sentence did not call for any review, no appeal to the Privy Council can lie under Cl. 41 of the Letters Patent. Points not generally raised at the trial are not points which, in ordinary circumstances, deserve much consideration as grounds for special leave.⁴ The circumstance that important questions of law are raised

1. *Barendra* (1923) 28 C. W. N. 377 : 39 C. L. J. 1 : 26 Cr. L. J. 52 : A. I. R. 1924 C. 545 ; 83 I. C. 580. See also *Pestanjji* (1873) 10 B. H. C. R. 75.
2. *Ramanuja* (1934) 68 M. L. J. 93 Sup. (S. B.) : 37 Cr. L. J. 64 : A. I. R. 1935 M. 793 : 159 I. C. 240.

3. (1914) A. C. 599 : 15 Cr. L. J. 326 : 23 I. C. 678.
4. *Barendra* (1924) 52 I. A. 40 : 52 C. 197 (P. C.) : 29 C. W. N. 181 : 41 C. L. J. 240 : 48 M. L. J. 543 : 27 Bom. L. R. 148 : 23 A. L. J. 314 : 26 Cr. L. J. 431 : A. I. R. 1925 P. C. 1 : 85 I. C. 47.

in the case, would not by itself be a valid reason for sanctioning an appeal to the Privy Council.⁵

The Privy Council will not consider appeals brought from the Original Jurisdiction of the Indian Courts unless there has been some violation of the principles of justice or some disregard of legal principles. The Privy Council will not turn itself into a Court of Criminal Appeal.⁶ The power to entertain appeals in criminal cases arises not from the relation of the Judicial Committee to the Court below, but as the Privy Council, advising the Sovereign with regard to the exercise of the prerogative. The prerogative is that remnant of the power of the Crown which remains to the Crown to interfere with tribunals of justice, which does not exist in Great Britain at all ; it has passed away in the historic development of the constitution ; it used to exist and does exist to some extent in the case of the Crown colonies, because they are managed directly by the Crown through ministers ; but in the case of self-governing dominions not even the principles of *Dillet's Case* have any application. With regard to India, which is on the way to becoming a self-governing dominion, it is with the utmost care that one should pronounce any proposition that that disappearing fragment of the prerogative remains. The Privy Council will not interfere in criminal appeals from India unless it can be shown that there was no proper trial at all, that the forms of all judicial procedure were disregarded, not merely according to local ordinances, but according to the unvarying character which is common to all. If there was any thing very gross, it might come under the same category, but even then the Crown has to be extraordinarily cautious in asserting the survivor even of the very restricted prerogative which existed fifty years ago, but which may not exist now.⁷

If a Court in India commits a mistake in the exercise of its jurisdiction, the Privy Council, which is not a Court of Criminal Appeal, cannot take cognizance of a mere mistake. It may interfere only where justice has been set at naught.⁸ The Privy Council will not act as a Court of Criminal Appeal and will not advise His Majesty to review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done. The refusal by the Governor-General of India to order that the trial should be held in a different province, where the accused alleged that a fair trial could not, in the state of public feeling, be obtained in the place where the trial would ordinarily be held, does not amount to violation of the principles of natural justice. Nor can the alleged inadequacy of the direction given by the Judge to the Jury amount to a disregard of the forms of process or violation of the principles of natural justice.⁹ The authority of *Dillet's Case* does

5. Ramanuja (1934) 68 M. L. J. 93 Sup. (S. B.) ; 37 Cr. L. J. 64 ; A. I. R. 1935 M. 793 ; 159 I. C. 240.

6. Rustom (1923) 48 B. 515 (P. C.) ; 26 P. L. R. 394 ; 1 O.W.N. 490 ; 26 Cr. L.J. 391 ; A.I.R. 1925 P. C. 59 ; 84 I. C. 935.

7. Hanmant Rao (1924) 49 B. 455 (P. C.) ; 26 Cr.

L. J. 1419 ; A. I. R. 1925 P. C. 180 ; 89 I. C. 843.

8. Ibid.

9. Shafi Ahmad (1925) 43 C. L. J. 67 (P. C.) ; 30 C. W. N. 557 ; 49 M. L. J. 834 ; 28 Bom. L. R. 158 ; 27 Cr. L. J. 228 ; A. I. R. 1925 P. C. 305 ; 92 I. C. 212 ; Channing Arnold

not justify interference by the Privy Council in a criminal case wherever there has been misdirection, leaving it uncertain whether that misdirection did or did not affect the Jury's mind. The practice of the Judicial Committee in respect of criminal appeals is to this effect : it is not guided by its own doubts of the appellant's innocence or suspicion of his guilt. It will not interfere with the course of criminal law, unless there has been such an interference with the elementary rights of the accused as has placed him outside the pale of regular law, or within that pale there has been a violation of the natural principles of justice so demonstratively manifest as to convince their Lordships, *first*, that the result arrived at was opposite to the result which their Lordships would themselves have reached, and, *secondly*, that the same opposite result would have been reached by the local tribunal also, if the alleged defect or misdirection had been avoided.¹⁰ For the Privy Council to interfere with a criminal sentence there must be something so irregular or so outrageous as to shock the very basis of justice. Contentions based on the meaning and effect of a Section of the Evidence Act are merely points for a Court of Criminal Appeal.¹¹ So, a mere mistake on the part of the Court below, as for example in the admission of improper evidence, will not suffice, if it has not led to injustice of a grave character. Nor do the Judicial Committee advise interference merely because they themselves would have taken a different view of evidence admitted. Such questions are, as a general rule, treated as being for the final decision of the Courts in Law.¹²

The Privy Council is not a Court of Criminal Appeal. Where there has been evidence before the Court below and the Court below has come to a conclusion upon that evidence, their Lordships of the Judicial Committee will not disturb that conclusion except where there has been a gross miscarriage of justice or a gross abuse of the forms of legal process.¹³ Their Lordship of the Privy Council expressed regret that the pains that they have taken to make clear the rules upon which their Board will proceed in considering the questions relating to criminal appeals should have been so widely misunderstood or so wholly ignored. The responsibility for the administration of criminal justice in India this Board will neither accept nor share ; unless there has been some violation of the principles of justice or some disregard of legal principles, this Board will not consider appeals brought from the criminal jurisdiction in the province of India.¹⁴ It will not interfere in cases of mere mistake of procedure on the part of the Courts below or mere misappreciation of evidence, where such matters had

(1914) 41 C. 1023 (P. C.) : 18 C. W. N. 785 : 20 C. L. J. 161 : 16 Bom. L. R. 544 : 26 M. L. J. 621 : 12 A. L. J. 1042 : 15 Cr. L. T. 309 : 23 I. C. 661.

10. Channing Arnold (1914) 41 C. 1023 (P. C.) : 18 C. W. N. 785 : 20 C. L. J. 161 : 16 Bom. L. R. 544 : 26 M. L. J. 621 : 12 A. L. J. 1042 : 15 Cr. L. J. 309 : 23 I. C. 661.

11. Mohi. dar Singh (1932) 59 I. A. 233 : 56 C. L. J. 593 (P. C.) : 13 L. 479 : 64 M. L. J. 77 : 34 Cr. L. J. 18 : A. I. R. 1932 P. C. 234 : 140 I. C. 290.

12. Dal Singh (1917) 44 I. A. 137 : 44 C. 876 (P. C.) : 21 C. W. N. 818, 822 : 26 C. L. J. 13 : 33 M. L. J. 555 : 19 Bom. L. R. 510 : 15 A. L. J. 471 : 18 Cr. L. J. 475 : 39 I. C. 311.

13. Begu (1925) 52 I. A. 191 : 30 C. W. N. 581 (P. C.) : 41 C. L. J. 437 : 6 L. 226 : 27 Bom. L. R. 707 : 48 M. L. J. 643 : 23 A. L. J. 636 : 26 Cr. L. J. 1059 : A. I. R. 1925 P. C. 130 : 88 I. C. 3.

14. Taba Singh (1924) 48 B. 515 (P. C.) : 26 P. L. R. 394 : 1 O. W. N. 490 : 26 Cr. L. J. 391 : A. I. R. 1925 P. C. 59 : 84 I. C. 935.

not caused substantial injustice. If real injury be done by the prosecution or the Court to an accused person by their manner of conducting the trial or admitting evidence, absence of objection by his Counsel would not excuse it; but absence of objection coupled with other circumstances may indicate that no injury was done.¹⁵ Where, however, there were really no materials for a conviction for murder as opposed to manslaughter, and in addition the trial was so conducted as in three separate respects, namely, the exclusion of the previous statements of the witnesses, restriction of the address by the Counsel (who, appearing for the second accused charged with being an accessory after the fact, was not allowed to address the Court questioning the evidence on the charge of murder with which the first accused was charged), and the neglect of the rules requiring corroboration, as to exhibit a neglect of fundamental rules of practice necessary for the due protection of prisoners and the safe administration of criminal justice, the Privy Council interfered¹⁶ Where it was not contended that a certain piece of evidence (alleged confession), if found inadmissible, the conviction could be supported, there by well-recognised principles laid down by the Privy Council it will interfere and set aside the conviction.¹⁷

No appeal lies to the Privy Council, under Cl. 41 of the Letters Patent, from an order made by the High Court in the Criminal Revisional Jurisdiction and consequently an application for leave to appeal from such an order cannot be entertained.¹⁸

Where leave was granted under Cl. 41, the prisoner was not required to furnish security for the costs of the appeal to His Majesty in Council.¹⁹

It has recently been held that after the disposal of a criminal case by the High Court and before leave to appeal has been actually granted by the Privy Council, the High Court has no jurisdiction to grant bail to the accused.²⁰ In the aforesaid case Cunliffe, J. also held that the High Court has also no power to grant an extension of time to accused for surrendering to his bail; though Henderson, J. was of opinion that though it would not be proper to do so, nevertheless the High Court has this power under S. 561A. Cr. P. C. Cunliffe, J., was also of opinion that it might be that after grant of leave by the Privy Council there would be a fresh seizin of the case by the High Court and its powers in regard to bail would then be revived [following *Tulsi Telini* (1923) 50 C. 585 and distinguishing *Subrahmania Ayyar* (1900) 24 M. 161].

15. Inayat Khan (1936) 40 C. W. N. 1101 (P. C.) : A. I. R. 1936 P. C. 199 : 163 I. C. 7 [re-affirming *Dal Singh* (1917) 44 I. A. 137 : 44 C. 876 (P. C.) : 21 C. W. N. 818 : 26 C. L. J. 13 : 33 M. L. J. 555 : 19 Bom. L. R. 510 : 15 A. L. J. 475 : 18 Cr. L. J. 471 : 39 I. C. 311 ; and in re Dillet (1887) L. R. 12 A. C. 459].

16. Mahadeo (1936) 40 C. W. N. 1164 (P. C.) : A. I. R. 1936 (P. C.) 242.

17. Nazir Ahmad (1936) 40 C. W. N. 1221 (P. C.) [referring to *Vaithinatha Pillai* (1913) 40 I. A.

193 : 35 M. 501 (P. C.) : 17 C. W. N. 1110 : 18 C. L. J. 365 : 11 A. L. J. 881 : 14 Cr. L. J. 577 : 21 I. C. 369].

18. Curtis (1934) 62 C. 389 : 39 C. W. N. 235 : 36 Cr. L. J. 1211 : A. I. R. 1935 C. 477 : 157 I. C. 653.

19. Barendra (1923) 28 C. W. N. 377 : 39 C. L. J. 1 : 26 Cr. L. J. 52 : A. I. R. 1924 C. 545 : 83 I. C. 580.

20. Babu Lall Chaukhani (1936) 40 C. W. N. 1313.

In a very recent decision,²¹ on an appeal from the Supreme Court of the Island of Ceylon, the Judicial Committee has laid down some very important principles. The trial in that case had been held under the Ceylon Ordinances relating to Evidence and Procedure, which are the same as the enactments contained in the Indian Evidence Act and the Indian Code of Criminal Procedure. The case was one in which the prisoner had been charged with murder and sentenced to death, on the majority verdict of a Jury divided in the proportion of 5 : 2. This sentence was afterwards commuted to transportation for life. It may be observed at the outset that, broadly speaking, the offence was sought to be brought home to the prisoner, not by means of any direct evidence of the crime, but by establishing : 1st, that the case was not one of suicide ; and 2nd, that the conduct of the prisoner, about the time, suggested his guilt. For a proper appreciation of some of the principles laid down in the decision a detailed examination of the facts and of the evidence, such as it was, is necessary. But the following points may be noted :—

1. Their Lordships quoted the statement of Lord Sumner in the case of *Ibrahim v. The King Emperor* (1914) A. C. 599 of the principle on which the Board acts in the matter of the review of a criminal case.

2. As regards the Judge's directions to the Jury, their Lordships observed :—

"The submission of the Attorney-General was well founded, that it is not for this Board to interfere because its conclusion as to guilt or innocence might differ from that of the Jury. But in the view of their Lordships, there are here no grounds on the evidence, taken as a whole, upon which any tribunal could properly, as a matter of legitimate inference, arrive at a conclusion that the appellant was guilty and any conclusion on the available materials would be, and is, mere conjecture or guess, which are not, in law or justice, permissible grounds on which to base a verdict. The only proper direction to the Jury in these circumstances was that they must return a verdict of not guilty or that they could not safely or properly find any other verdict".

3. On the question whether death was due to suicide or homicide, their Lordships observed thus :—

"Upon a review of the charge of the learned Judge as a whole, their Lordships do not find that it was calculated to bring before the minds of the Jury the essentials of the case in respect of these circumstances : (1) that the only evidence, as to where the accused was at or before the time of the death was in his favour, or if the evidence were disbelieved and disregarded there was no evidence of his presence in his wife's room at the material time ; (2) that there was particularly strong evidence pointing to a tendency or inclination on the part of the lady to commit suicide. This point was mentioned more than once, but as no more than balancing the motive for murder. This is unsatisfactory, because assuming that there was such a balance as regards motives for suicide and murder yet more than motive was disclosed by the evidence.

21. *Stephen Seneviratne* (1936) 41 C. W. N. 65.

There was disclosed, as has been said above, a tendency towards suicide in the deceased. No tendency towards violence or murder in the accused was even suggested. (3) That the medical evidence was completely ambiguous in its effect, and did not show any preponderance of opinion among the doctors that the physical conditions apparent at the post-mortem were such as to be consistent only with the hypothesis of homicide or to point clearly in that direction. In considering the weight which a Jury could properly attach to this medical evidence it is important to observe that the question was not whether they were justified in preferring the opinions of those doctors who thought that the appearance of the body pointed to the application of external force rather than to the application by a suicide of a handkerchief soaked with chloroform, but rather whether the evidence of the medical experts as a whole pointed so clearly in the direction of homicide that the evidence of the three servants that the Appellant was elsewhere than in the room of the deceased, must be rejected as untrue. Expert evidence to have that effect must be clear and decisive. Their Lordships are unable to take the view that the Jury was properly directed on this important aspect of the case: they were left to infer that they were at liberty to accept either of the views put forward by the medical witnesses, conflicting as they were, and even to put aside all the medical evidence and to form their own opinion from the facts as to whether they pointed to homicide rather than to suicide. In the opinion of their Lordships the expert evidence was so conflicting, where it was not hesitating and doubtful, that the learned Judge should not have invited the Jury on matters involving medical knowledge and skill to come to a conclusion for themselves to which the medical men could not point the way either with certainty or with even an approach to agreement amongst themselves. It is apparent that this general tendency of the summing up was to lead the Jury to think that in effect they might convict the accused mainly if not entirely on the view they formed of his conduct. Many of the matters discussed under this head seem to their Lordships to be most uncertain in their effect and unreliable as a guide to a conclusion. There were points against the Appellant. There were others in his favour. The greater number were merely ambiguous. It has always to be remembered that as the evidence showed the Appellant was in danger, even if suicide were found to be the cause of death, of incurring at least moral blame, and it was quite consistent with innocence of murder that he should prefer misadventure to be deemed to be the cause of death. Still, if there had been other evidence of weight their Lordships do not doubt that a Jury might properly have taken into account these matters of conduct. But in this case at the end of the evidence the result was that there was no direct evidence justifying a conviction and for reasons already given there was no medical or other circumstantial evidence justifying a conviction; and to arrive at an adverse verdict on the strength of opinions formed as to the conduct of the accused was, their Lordships think, to act upon the merest scintilla of evidence and to be impermissible."

4. On the question of burden of proof the Judge had said,—

"He has got to explain**In the absence of explanation the only inference is that

he is guilty." Their Lordships referred to S. 106 of the Ordinance (which is the same as S. 106 of the Indian Evidence Act) and *Attygale v. The King* (1936) A. C. 338 and observed thus :

"Its tendency would be to lead the Jury to suppose that if anything was unexplained which they thought the appellant could explain, they not only might but must find him guilty. In a very difficult and quite exceptionally mysterious case such as this, the area of the unexplained was extensive, and how much the appellant himself could explain depended on where he was at material times, and indeed, on the very matter in issue at the trial, namely his guilt or innocence. One thing is quite clear, that this case and *Attygale's* case are wide apart in one respect. In *Attygale's* case this Board did not interfere because, owing to clear evidence of guilt free from all connection with the irregularity complained of, the irregularity caused no injustice. Here the case even as left to the Jury hung suspended in a wavering balance, and no one can say what tipped the scale against the appellant."

5. As regards the provisions contained in the Ordinance which are the same as contained in Ss. 154 and 155 of the Indian Evidence Act, it has been held that it is neither desirable nor permitted that evidence of what a prosecution witness had previously said should be given by the prosecution to contradict him without previous cross-examination of such witness with the leave or consent of the Court. Also, that—

6. The Jury should be warned, as they were in the present case, that evidence of previous statements of a witness not admitted by the witness to have been made and not adopted by him in his evidence in Court is not evidence of fact. Such evidence, as hearsay evidence, may make the warning ineffective, if it is present in abundance.

7. As regards the duty of the prosecution to call all material witnesses available their Lordships, referring to the case of *Ram Ranjan Roy* I. L. R. 42 Cal 422 observed :—"It is said that the state of things above described arose because of a supposed obligation on the prosecution to call every available witness, on the principle laid down in such cases as *Ram Ranjan Roy v. The King-Emperor* to the effect that all available eye-witnesses should be called by the prosecution even though, as in the case cited, their names were on the list of defence witnesses. Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions ; but at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and of reliability, or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on

which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution."

8. There was a complaint that after the evidence was concluded the hearing was reopened and there was a further hearing at the appellant's house where the death occurred. On this complaint their Lordships said,—

"The proceedings on 8th June, 1934, seem to have been a combination of a view and a further hearing with the introduction of some features permitted by neither procedure, such as the performance of an experiment with chloroform by Dr. Pieris, who does not appear to have been sworn as a witness, the Judge and the foreman of the Jury being present with Dr. Pieris in a room and rest of the Jury being somewhere else. The jurors seem also to have been divided for the purpose of other experiments in sight and sound and to have been asked questions as to the impressions produced on their senses. Their Lordships have no desire to limit the proper exercise of discretion or to say that no view by a Jury can include an inspection or demonstration of relevant sounds or smells; but they feel bound to record their view that there were features in the proceedings of 8th June which were irregular in themselves and unnecessary for the administration of justice. Their Lordships do not find it necessary to consider whether any injustice resulted in this particular case, but they regard proceedings so conducted as tending, in the words used in *Ibrahim's Case* (1914) A. C. 599 "to divert the due and orderly administration of the law into a new course which may be drawn into an evil precedent in future."

9. There was also a complaint that the Judge had put pressure on the Jury to compel them to arrive at a unanimity. With regard to this complaint their Lordships said,—

"The matter of undue pressure on the Jury can be shortly dealt with. In the course of his charge the learned Judge is reported to have said this: "The verdict, whether it is a conviction or an acquittal, I hope it will be unanimous, owing to the serious and grave nature of the case, but if you cannot agree please remember that I have got the full power to ask you to reconsider your verdict, but four to three means an unacceptable verdict. That means you have to go through the trial again. I hope you will not have this misfortune.' It was said that this meant and the Jury would understand, that if they did not agree, they would have to try the case afresh. Their Lordships are satisfied that the learned Judge can have had no intention of threatening the Jury with such a fate and must, as the Attorney-General said, have been referring to a possible necessity for a further direction from him and for a new and prolonged deliberation. Their Lordships also recognise that in this case, as often, the shorthand note is not in all respects either complete or accurate; but the form the note takes in this passage seems to indicate that the short-hand writer understood the language in the sense complained of and the Jury may unfortunately have done the same."

CHAPTER IV.

References to the High Court.

List of Headings :—

1. History of the Section.
2. Later decisions of the different High Courts :—
 - A. Calcutta.
 - B. Bombay.
 - C. Madras.
 - D. Allahabad.
 - E. Patna.
 - F. Lucknow.
 - G. Nagpur.
3. The Judge.
4. "Disagrees with the verdict of the Jury."
5. Cases of offences triable partly by Jury and partly by Assessors.
6. All or any of the charges * * has been tried.
7. Any accused person.
8. When the Judge should refer.
9. Recording the grounds of his opinion &c.
10. Reference, not in proper form, may be returned.
11. Proceed to try him on the charge, under the provisions of S. 310 Cr. P. C. if any.
12. The Judge shall not record judgment of acquittal or of conviction on any of the charges tried.—Sub-s. (2).
13. Limited Reference.
14. The High Court may exercise any of the powers which it may exercise on appeal.—Sub-s. (3).
15. "Subject thereto."
16. Procedure on the hearing of the Reference.
17. Meaning of the word "opinion."
18. Assessment of weight of verdict.
19. Unreasonable verdicts.
20. Verdicts induced by Judge's mistakes or misdirections.
21. Benefit of the doubt.
22. Of any offence of which the Jury could have convicted him.
23. Ss. 307 and 418 Cr. P. C.—Difference in the scope of enquiries.

1. History of S. 307 Cr. P. C.—

This is the last of the Sections in Division F of Chapter XXIII, dealing with the conclusion of the trial in cases tried by the Jury. The law relating to the procedure as to reference to the High Court in case of disagreement with the verdict of the Jury has undergone changes from time to time and many of the reported decisions are now obsolete. It is necessary, therefore, to know the changes made from time to time, and so a history of the Section is given below.

No subject has given rise to so much diversity of judicial opinion in this country as references from the verdict of the Jury. Such opinion has not been uniform amongst the different Courts and has fluctuated in one and the same Court at different times ; and as regards the Calcutta High Court it may be briefly said that, at particular periods, the Court has been divided against itself. This divergence of judicial opinion is attributable to an omission on the part of the Legislature to explain what it means when it asks the High Court on such a reference to give due weight to the opinions of the Sessions Judge and the Jury'. There are some who disapprove of the provision empowering Sessions Judges to make a reference at all on a disagreement from the verdict of the Jury ; and though they would excuse the Legislature for having thus encroached on the fundamental conceptions of a trial by a Jury and of the consequent finality that attaches to a Jury verdict, they would maintain the sanctity of such verdict in so far as it has not been directly or expressly touched by the Legislature and would persist in holding that in giving weight to the verdict they would treat the opinion of the Jury on a question of fact as final. On the other hand, there are some who would discard all suppositions as to an intention on the part of the Legislature to regard the opinion of the Jury, even on pure questions of fact, as having any finality, and taking the words of the Code as they are and while ostensibly 'giving due weight to the opinions of the Sessions Judge and the Jury' would, practically and truly, give no weight to the opinion of either. Between these two extremes are innumerable other positions, some not quite supportable on reason or on logic, which have been taken up by Judges, whose knowledge and eminence, however, can scarcely be doubted. The view that is taken of the duty of the High Court in this respect is sometimes coloured by considerations as to what circumstances would justify the making of a Reference which the legislature in the current Code has left to be understood by the words, 'If * * the Judge disagrees ...and is clearly of opinion that it is necessary for the ends of justice to submit the case", etc.

To deal with this subject, it would be convenient to notice some of the provisions of Act XXV of 1861. Section 322 of the Act empowered the Local Government to order that the trial of all offences, or of any particular class of offences in any district, shall be by Jury ; but Section 323 provided that all trials in Courts of Session of Europeans who were not British subjects and Americans shall be by Jury of at least one half of Europeans or Americans, unless they elected to be tried without Jury, but there would be no such option if Jury trial had been ordered by Government for the District. The European British subjects, it may be noted, continued to be tried by the Supreme Court as before, the Act only introducing some provisions for their arrest, bail or committal. Under Section 327, the Jury in a Court of Session were to consist of an odd number, not less than 5 or more than 9, to be fixed by order of the Local Government. Section 328 provided that on unanimity of all the Jurors, or of 4 out of 5, 5 out of 7, or 6 out of 9, the accused might be convicted ; and that on unanimity of all the Jurors, or of 4 out of 5, 5 out of 7 or 6 out of 9, the accused should be acquitted ; and that no verdict should be received except from the numbers aforesaid. Section 351 laid down that in case of verdict of guilty or not guilty of the Jury composed of less than the required number, there should be a new trial by a new Jury, and if on any new trial by Jury, the accused shall not be found guilty by a majority of the requisite number as aforesaid he shall be acquitted ; or

in other words, an acquittal by a simple majority shall be final. Section 407 provided that there shall be no appeal from a judgment of acquittal passed in any Criminal Court. Section 408 gave an appeal to the Sudder Court from a conviction on a trial by Jury, on a matter of law only. There was no provision in the Act for a Reference to be made by the Judge on disagreement with the verdict of the Jury. But in Chapter XXIX, which was headed "Sudder Court as a Court of Revision", there were two Sections, which, with advantage, may be quoted *verbatim*.

S. 403.—The Sudder Court, in any case tried before a Court of Session in which, upon a review of the abstract statement or calendar of prisoners punished without reference* it shall appear that there has been error in the decision of the Court of Revision of trials. Session on a point of law, or that a point of law should be considered by the Sudder Court, may call for the record, or such portions thereof as it may deem necessary, together with the Judge's direction to the Jury, if the case has been tried by a Jury, and upon reviewing the depositions of the witnesses, the direction of the Judge and the conviction, may determine any point of law arising out of the case, and thereupon pass such order as the Sudder Court shall seem right.

(* i. e., for confirmation of sentence of death.)

S. 406.—Whenever a case shall be revised by the Sudder Court under this Chapter, Proceedings of a case revised by Sudder Court to be certified to Court in which conviction was had. the Court shall certify its decision or order to the Court in which the conviction was had or by which the order was passed, and such Court shall thereupon make such orders as are conformable to the decision of the Sudder Court, and if necessary amend the record in accordance therewith.

Provided that, in any case which shall be revised by the Sudder Court under this Chapter, it shall not be competent to the Sudder Court to reverse the verdict of the Jury, or except as provided in this Chapter, to alter or reverse the sentence or order of the Court below. Proviso.

In this state of the law there came up before the Calcutta High Court a case *The Queen v. Gora Chand Ghose* (1868) 3 B. L. R. (F. B.) 1 = 11 W. R. 29, in which a prisoner had been acquitted by the unanimous verdict of the Jury upon an express direction to acquit given by the presiding Judge, which direction was held by the High Court as erroneous and contrary to law. The question then arose, whether the High Court was competent to quash the proceedings and order a new trial. It was held by the majority of the Full Bench (Peacock, C. J., Bayley, J., Macpherson, J. and Mitter, J. ; L. S. Jackson, J. *dissentientae*) that,—

"The verdict of a Jury cannot be reversed by a Court of Revision, even if it be a verdict of 'guilty.' The only remedy for the prisoner in such a case is an appeal (which can only be on a question of law) or an application to the Executive Government. Nor can a verdict, pronounced by a Jury, of 'not guilty' be reversed by the High Court on revision, and it is clear that no appeal lies from such a verdict".

Thus, prior to the enactment Act X of 1872, S. 263 of which for the first time gave the Sessions Judges power to make a Reference to the High Court, they were powerless to do

anything where they disagreed with the verdict of the Jury. The High Court, from time to time, advised them as to how they should act in such matters, but these advices were not always consistent and the remedies suggested were scarcely comprehensive enough. The following cases will illustrate the courses that were suggested :

In *Munceeram Chung*,¹ a prisoner had been convicted of culpable homicide by the Jury before whom he was tried. The Sessions Judge thought the verdict wrong and that the prisoner should have been convicted of the higher offence of murder. He, however, sentenced the prisoner to 10 years' transportation. An appeal was taken from this order to the High Court. Loch, J. said,—“If the Judge thought so, though he could not interfere with the finding, he might have sentenced the prisoner to transportation for life. This Court cannot enhance the sentence passed on the prisoner, which is perfectly legal.” Thus the advice was that if the verdict was for lesser offence than what the Judge thought it should be, the maximum sentence for the lesser offence might be passed.

In a letter dated 19th December 1864² the Calcutta High Court pointed out to a Sessions Judge that when a Judge considers the prisoner innocent of the charge on which he has been convicted by the Jury, his proper course is not to pass an inadequate sentence but to pass a sentence commensurate with the nature of the offence of which the Jury found him guilty and then refer the case to the Local Government under S. 54 of the Code of Criminal Procedure (of 1861) for remission of the punishment awarded.

In another case³ it was said,—“The Judge should, even when he differs from the Jury inflict such a sentence as he would have passed had he agreed with the Jury. He may take other measures to obtain the release of the accused, if he considers that the accused is not guilty or that the charge against him is not proved.”

Also—“It is not for him to nullify the verdict of the Jury by passing a sentence inadequate to the offence which they considered proved against the prisoner.”⁴

Again—“The High Court (like the Sessions Judge) cannot nullify the verdict of the Jury by interfering to lessen the punishment ; the remedy lies with the Executive Government”.⁵

In *Queen v. Chand Bagdee*⁶ the Sessions Judge had very clearly pointed out to the Jury that against seven of the prisoners there was no evidence at all ; he had also commented on the extreme weakness of the evidence against three of the other prisoners and the grounds for suspecting the genuineness of the confession of the remaining one. In spite of these remarks the Jury brought in a verdict of guilty against all the prisoners. A conviction upon no evidence being wrong on a point of law, the conviction of the first seven prisoners was quashed by the High Court. As regards the next three also the High Court were of opinion that

1. (1864) 1 W. R. 19.

2. (1864) Cr. Lett. No. 1092 : 1 W. R. Cr. Lett. 9.

3. Sheikh Gholam Mustuffa (1865) 3 W. R. 29, per Jackson, J.

4. Puddomonie (1866) 5 W. R. 94, per Glover, J.

5. Bissonath (1866) 6 W. R. 6.

6. (1867) 7 W. R. 6.

there was no evidence against them and it was held that the Sessions Judge ought also to have so directed the Jury, and the High Court quashed their conviction. As regards the remaining prisoner, being unable to hold that there was no evidence, it was thus said : "The case against this prisoner was one which required very close and attentive consideration. But the lamentable incompetence which this Jury has displayed in the performance of their duties with respect to the other ten prisoners, does not induce us to place much reliance on their verdict in this case ** If the Sessions Judge is of opinion that the prisoner has been improperly convicted he may and ought to bring this case to the notice of the proper authorities as one to which the clemency of the Crown ought to be extended. The Sessions Judge ought to have recorded distinctly for the information of this Court whether or not he agreed in the verdict of the Jury."

Where a Jury convicted a prisoner contrary to the charge of the Sessions Judge, which charge was held by the High Court to have been a proper charge, the High Court refused to interfere, although it had concurred with the Sessions Judge in thinking that the verdict of the Jury was not correct. It was held that the case was one in which an application could be made to the Government, but as far as the Court was concerned, the petitions were rejected. It was said : "The Judge properly directed the Jury * * The Judge has said that he does not approve of the verdict, because the conviction rests upon the testimony of accomplices only, but he adds to that,—'The Court cannot say that any injustice has been done.' What he means to say by that, I do not personally know. The case stands thus : the Jury have, contrary to the direction of the Judge, exercised a power which they possessed of convicting the prisoners. There is no matter of law upon which there can be an appeal to this Court, and no matter, in my judgment, in which this Court has power to set aside the verdict of the Jury and to direct an acquittal. A decision of this Court⁷ has been handed up to us. With every respect to the learned Judges who made that decision I am unable to concur with them. I think the proper course in this case is not for the High Court to set aside the verdict of the Jury and acquit the prisoners, but it is a case in which an application may very properly be made to the Government, and it will be supported by the opinion which has been expressed by the Judge that he did not approve the verdict of the Jury, in which we concur. As regards any order of this Court these five petitions must be rejected.⁸

In Act X of 1872 S. 263, the following provision was enacted :

"In cases tried by a Jury if the Court does not think it necessary to dissent from the verdict

7. Shib Chunder (1870) 18 W. R. 46, foot-note, *per* Kemp, J.—"The verdict of the Jury is supported by no evidence, and is so clearly wrong that we referred to the Judge to know whether the verdict of the Jury was approved of by him. The Judge has now, in reply to our call, stated that the verdict was disapproved of by him and given his reasons for disapproving of the verdict, in which we concur. It is

perfectly clear to our minds that the prisoner is innocent, and that there has been no alteration in these accounts. The entry in the plaint of the 26th Assar was clearly a mistake. We acquit the prisoner, and direct his immediate discharge."

8. Nidheeram (1872) 18 W. R. 45, *per* Couch, C. J.

of the Jury or of a majority of the jurors, it shall give judgment accordingly. But if the Court disagrees with the verdict of the jurors, or of a majority of such jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court, and may either remand the prisoner to custody, or admit him to bail.

The High Court shall deal with the case so submitted as an appeal, but it may convict the accused person on the facts, and, if it does so, shall pass such sentence as might have been passed by the Court of Session."

In the Code of 1872 as well as in the succeeding Codes the idea of absolute majority was given up and a bare majority of one was sufficient to give the verdict the character of a majority verdict.

The view which the Courts took as regards the circumstances which would justify a Reference and the duties of the High Court in dealing with it under the Act of 1872 will appear from the cases noted below.

The Jury found the prisoner not guilty of the offence of murder in that "by reason of momentary unsoundness of mind, he was incapable of knowing the nature of the act he committed or that he was doing what was wrong or contrary to law." The Sessions Judge considered the finding of the Jury opposed to the medical evidence recorded on the trial and recommended that the verdict of the Jury be set aside. At the same time he stated that he did not think that the case was one in which a capital sentence should be passed. The prisoner was at the time of the trial under sentence of transportation for life on a conviction for the murder of a child for the sake of his ornaments, so that if he was found guilty the only sentence which could be passed would, according to S. 303 I. P. C., be death. The High Court after discussing the evidence on the point observed :

"After giving full consideration to these opinions, which being those of professional men are entitled to respect, we think that they are not of such a direct or decided character as would justify us in saying that the prisoner was *undoubtedly* sane at the time of committing the murder with which he is now charged, and nothing short of such a conviction on our part would warrant our interference with the verdict of acquittal come to by a Jury."⁹

Again,—

"I have already in other references of this nature, stated my opinion that this power given by this Section should be very sparingly exercised, and that in no case should the High Court take action unless it were conclusively shown that the Jury had given a perverse verdict in the teeth of the evidence and that a failure of justice has been the result".¹⁰

The powers and functions of the High Court acting under S. 263 of Act X of 1872

9. Doorjodhun (1873) 19 W. R. 45.

10. Jaffir Ali (1873) 19 W. R. 57, *per* Glover, J.

before the amendment introduced by Act XI of 1874, were dealt with elaborately in a case¹¹ in which the whole question was the weight to be given to the evidence of recognition of accused persons, to the identification of property and to a confession. The Judge in his Reference had given reasons for thinking that the recognition of the prisoners by the witnesses could not be depended on, that the identification of stolen articles was untrustworthy and that the confession of K. L. was not a true and real confession but a confession which had been obtained by some contrivance of the Police or in such a way, at any rate, as served to render it altogether untrustworthy. The Judge also complained that the Jury had not followed his directions as to the law. It was held that the High Court, in a case submitted under this Section, may acquit the prisoner, if it thinks fit, on the facts, notwithstanding that the Jury had found the prisoner guilty. Phear, J. (Glover, J. concurring) said :—

“But a question of somewhat of a serious character has arisen as to our powers in this case to acquit. The case comes before us in consequence of the Judge having submitted it to this Court under the provisions of Section 273 of the new Criminal Procedure Code. According to that Section, (The Section is here quoted) **
 Meaning of ‘shall deal with the case so submitted as with an appeal.’ Do these words, “shall deal with the case so submitted as with an appeal”, mean that the case submitted shall be in all respects considered and situated as an appeal? If so, then it is an appeal, if not preferred by the prisoner, yet preferred on his behalf against a conviction of a Jury : and Section 271 says : “If the conviction was in a trial by Jury, the appeal shall be admissible on a matter of law only.” And in the case before us the ground upon which the verdict of the Jury is sought to be set aside is undoubtedly, in substance, a matter of fact, and not a matter of law. The construction of these words, to mean that the case submitted is to be considered essentially as an appeal, seems to be somewhat favoured by the words which follow—“But it may convict the accused person on the facts”; because ‘but’ seems to imply something in the way of opposition to, or inconsistency with, what would be the case of an appeal if that ‘but’ was not there. And certainly, if the appeal were preferred by the prisoner, it would be admissible on matters of law only. At the same time, it is also obvious that, in the case of an appeal preferred by the prisoner, the Appellate Court could never have any occasion to convict on the facts, because, by the nature of the case, such an appeal must always be an appeal against a conviction already arrived at in the Court below. And in the case of an appeal preferred on the part of the Crown against an acquittal (allowed for the first time by Section 272 of the new Code), it does not appear that there is any restriction imposed relative to the exercise of the discretion of the Appellate Court. Therefore, looking back again to the words of the Section which I have already read, it seems to me on the whole that the case submitted under this Section in the case of a conviction must be intended by the Legislature to be submitted for a wider purpose than simply that of becoming an appeal presented by the prisoner. The words are : “If the Court disagrees with the verdict of the Jurors or of a majority of such Jurors, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court.” Now, the Court may disagree with

11. Koonjo Leth (1873) 11 B.L.R. 14 : 20 W. R. 1,

the verdict of the Jury, either on the ground that the Jury had not followed its directions on a point of law, or on the ground that the Jury had found the facts against what appeared to the Judge the weight of evidence. If the Legislature had intended the case, which was to be submitted to the Judge, in the event of a conviction, to be limited to a point of law only, nothing would have been easier than to have used words which would have made that limitation perfectly unmistakable. But the words I have read are, on the contrary, general words, without any limitation at all ; and it seems to me impossible in reason to construe them otherwise than as extending to a disagreement with the verdict on matter of fact as well as on matter of law. And then the Section goes on to say :—"And if the Court considers it necessary for the ends of justice to do so." It appears to me that justice may as much require that a verdict of the Jury should be revised in a case in which the Jury has gone wrong on facts as in a case where it has made a mistake in regard to law. So that, on the whole, I think there is really no limitation as to the nature of the case which the Judge may send up to the High Court, a case in which he disagrees with the Jury in their finding of facts, as well as a case in which he complains that the Jury has not followed his direction as to the law. And I think that the word "but" may possibly be used, not so much as in opposition to the word "appeal" in the first part of the passage, as perhaps in opposition to or enlargement of the enactment of Section 272. According to Section 272, "the Local Government may direct an appeal by the Public Prosecutor or other officer specially or generally appointed in this behalf from an original or appellate judgment of acquittal ; but in no other case shall there be an appeal from a judgment of acquittal passed in any Criminal Court." Construing the word 'but' to be used with reference to this Section, it would simply mean that, upon a case submitted by the Judge, the Court may, in the event of an acquittal, convict the accused person on the facts, notwithstanding the general prohibition to be found in the words of Section 272, which I have read. Or, again it may be used with reference to the situation of a case so submitted by the Judge, when it comes up to the High Court. That situation is peculiar in this respect, namely, that no judgment has been passed in the Court below from which this, so to speak, appeal has been brought ; and this part of the passage may, therefore, mean that, in the event of the Court, upon consideration of the case submitted, being of opinion that there should be a conviction and judgment thereon, it is empowered to pass it as an original Court, notwithstanding, and indeed because, there has been none passed in the Court below. However this may be, it seems to me, after the best consideration which I can give to the question, that, on a case submitted by a Sessions Judge, under the provisions of Section 263, the High Court can acquit the prisoner, if it so thinks fit, on the facts, notwithstanding that the Jury has found the prisoner guilty. I construe the words, "shall deal with the case so submitted as with an appeal", simply as directing the procedure to be followed, such as regards the notices which are necessary to be served, and so on. And I apprehend that, under these words, the Court may, if the case calls for it, send for additional evidence, and may deal with the case generally as is provided in Chapter XX with regard to appeals. No doubt, the result of this construction is that the prisoner is in a better situation with regard to an

appeal if that appeal be made through the intervention of the Judge under Section 263, than if he had preferred it himself, because Section 271 undoubtedly says that, if the conviction was in a trial by Jury the appeal by the person convicted shall be admissible on a matter of law only. But this is not the only peculiarity of a similar kind which is to be found in this Criminal Procedure Code, because, in the event of the conviction of a prisoner by a Jury for the crime of murder and sentence of death following thereon, upon the reference which must be made to this Court for confirmation of the sentence, this Court has the power, by section 288, to acquit the prisoner on the facts, although, if the prisoner had been sentenced to transportation for life, instead of to death, and had simply himself appealed, the Court would not have been able to disturb the verdict of the Jury on the facts. I am, therefore, of opinion that all the prisoners, excepting the first prisoner, should be acquitted and discharged from custody, so far as this conviction is concerned. The case is different with regard to Koonjo Leth, because he undoubtedly has confessed to have taken part in the dacoity, and that confession is ample evidence against him to support the conviction. As it falls upon us to pass sentence upon Koonjo Leth, we think that the sentence should be three years' rigorous imprisonment."

The principles on which the High Court would proceed under S. 263 of Act X of 1872 were explained in another case¹² in which it seemed to the High Court that the verdict of the Jury might have resulted from a reluctance on their part to rely upon a retracted confession of the prisoner. The High Court convicted the prisoners, relying on his retracted confession and observing as follows :—

"We think it likely that the majority of the Jury may have felt some doubt about accepting the confession. But giving all the weight that is undoubtedly due to their opinion and their experience in these matters, it seems to us impossible to do otherwise than to hold that the prisoner is bound by the statement which, as already shown, he, after deliberation, had chosen to make. It must be remembered that the prisoner is not an ignorant man. He appears to be a man of considerable education, and as such not open to influences, and not so easily to be deluded as persons might be of an inferior position in life. Now, taking this as a statement which he chose to make as to what took place during that night in the room where he was with the deceased, we think that the very lowest inference which can be drawn from it is that the prisoner is guilty of culpable homicide not amounting to murder. The prisoner, no doubt, tries in that statement to make us believe that the woman attacked him ; that she, after abusing him, seized him by the leg, and that he only just caught hold of the cloth round her throat, and pulled it without regarding much what he was doing, and without any expectation that such consequence would ensue as to cause her death. But that part of his statement is not only to the last degree improbable in itself, considering the length of time which it takes to put an end to a life by strangulation, and considering also the very slight provocation which the prisoner had received, but it is positively

In the case of a retracted confession, giving all weight that is due to the opinion and experience of the Jury, the High Court may adopt a contrary view.

12. Ram Churn (1873) 20 W. R. 33,

contradicted in one most essential particular by the evidence. It is proved by several witnesses—and we see no reason to doubt that in this they spoke the truth—that the cloth which was found in the woman's neck was not merely pressed upon it, but was tied in a single knot round her throat, and the only object of this that can be conceived is strangulation."

In *Queen v. Nabin Chunder Banerjee*¹³ it was held that in dealing with a reference under S. 263 of Act X of 1872, the Jury having acquitted the accused, the High Court must deal with it as an appeal by the prosecution and has authority to convict the accused person on the facts and to pass sentence accordingly—Section 257 of the Code by which the Court has the power to decide which view of the facts is correct, being read as qualified by S. 263. It was also said,—“We quite agree, however, that the powers given to this Court by Section 263 are not to be lightly exercised and that the unanimous verdict of the Jury ought not to be set aside, even if the Sessions Judge disagrees with it, unless the

Verdict not to be interfered with unless clearly and patently wrong and unsustainable on the evidence.

verdict is clearly and patently wrong and unsustainable on the evidence.

If there were any substantial doubt in the case, we would certainly not disturb the verdict. It appears to us, however, that there can be no reasonable doubt about this matter. On the whole, we think the verdict of the Jury was so utterly wrong and so entirely against the evidence that we consider the Judge acted rightly in submitting the case under S. 263 and that it is our duty to convict the prisoner on the facts.”

In a case¹⁴ in which the accused were tried on charges of murder (S. 302), culpable homicide not amounting to murder (S. 304), voluntarily causing grievous hurt (S. 325), the Sessions Judge at the trial added a further charge of house-breaking by night in order to the commission of an offence (S. 457). The Jury unanimously acquitted the prisoners of the three original charges, and a majority of them (four out of five) acquitted them also of the last charge. The Sessions Judge agreed with the verdict of the Jury as regards the three original charges, and recorded a formal order, acquitting and discharging the prisoners of these three charges. He differed from the majority as to the fourth charge and referred the case to the High Court under S. 263 Cr. P. C. Held that where the Sessions Judge has approved of a verdict on certain charges and finally acquitted and discharged the accused as to those charges, the High Court cannot under S. 263 convict on the facts on those charges. That Section seems to contemplate a case where, without

Without recording any order of acquittal or conviction on any of the charges, the whole case is to be referred.

recording any order of acquittal or conviction, the Sessions Judge refers the whole case. As there was nothing in the case to show on what grounds the majority of the Jury acquitted the prisoners of the additional charge, and as the Sessions Judge agreed with the unanimous verdict as to the three original charges, the High Court presumed that the reason which weighed with the

majority of the Jury in finding the prisoners not guilty of the additional charge must have weighed with the whole Jury in finding them not guilty on all the other three original charges, and accordingly the Court could not set aside the verdict of the majority on the last

13. (1873) 20 W. R. 70.

14. Udaya Changa (1873) 20 W. R. 73.

count, without practically finding directly in the teeth of the verdict of the unanimous Jury on the first three counts.

Following *Ram Chundra* (1873) 20 W. R. Cr. 3, the High Court declined to interfere under S. 263, Act X of 1872, in a case in which the Jury had acquitted the prisoner, believing his statement to be true. It was said : "It seems to us that the verdict in this case, with which the Sessions Judge disagrees, cannot be said to be 'clearly and patently wrong and unsustainable on the evidence'. If the statement which was made by the prisoner in Court is true and the Jury have, no doubt, believed that it was true (indeed, according to the reference made to us by the Judge, they informed him that they did so) then their verdict was probably right in fact. We, therefore, think that there is not sufficient reason to interfere with the verdict which they gave".¹⁵ In another case¹⁶ it was said, "We feel impossible to say that they (the Jury) were so entirely mistaken in their verdict, that they were so patently wrong, that we ought to exercise the extraordinary powers which are given to us under S. 263."

In *Queen v. Sham Bagdi*¹⁷ Machperson, J., said thus :—"The evidence against the prisoners, in whose interest the Judge has referred this case to the High Court under S. 263, is certainly not very strong, in as much as it consists solely of the statement of the prosecutrix. Nevertheless, the evidence is quite sufficient, if believed. The Jury did believe it ; and how can we say that they were wrong in doing so ? It is as likely as not that they were right. And is the High Court to set aside a verdict in such a case ? I think we ought not to interfere with a verdict, unless we can say decidedly that we think that it is clearly wrong. If we are to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then we must hold that real trial by Jury is absolutely at an end, and that the verdict of a Jury is of no more weight than the opinion of assessors. I presume that if this were the intention of the legislature, it would have said so, but the legislature has not said so. As it is, I consider that the Court should exercise the powers vested in it by S. 263 only in cases in which it finds the verdict of a Jury clearly and undoubtedly wrong. This is not such a case, although I may admit that there may be room for doubts being entertained as to the facts. Therefore, I think the verdict of the Jury should remain undisturbed, so far as this Court is concerned, and that the Sessions Judge must pass sentence on the prisoners."

The Jury acquitted the prisoner. The Sessions Judge differed and made a reference under S. 263 Act X of 1872. The Sessions Judge was of opinion that there was no reason to doubt the truth of the prisoner's confession which was retracted before him. The High Court, holding that the confession had been properly admitted and finding it full and clear and supported by reasonable evidence, acted upon it and convicted the accused, observing : "We

15. Haroo Manjhee (1873) 21 W. R. 4.

16. Musst Itwarya (1874) 14 B. L. R. App. 1.

17. Sham Bagdi (1873) 13 B. L. R. App. 19 : 20 W. R. 73.

are reluctant generally to differ from any opinion the Jury, or a majority of them, may arrive at ; but in a clear case like this we cannot accept the view of the Jury (which The case must be a clear one. we may further remark was not unanimous) in preference to the confession of the prisoner.¹⁸

In the case of the *Queen v. Khanderav Bajirav*,¹⁹ West, C. J. made the following observations in a case coming before it under S. 263 of the Code of Criminal Procedure : "It is a well-recognised principle that the Courts in England will not set aside the verdict of a Jury, unless it be perverse and patently wrong, or may have been induced by an error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers ; first, on the constitutional ground of taking as little as possible out of the hands to which it has been primarily assigned by the Legislature ; and, secondly, because any undue interference may tend to diminish their sense of responsibility. Burke, profoundly versed in the principles of the British Constitution, said of Juries : "I will make no man, or set of men, a complement of the constitution." In this country, we must never let our acquiescence grow into a betrayal of justice. When Juries know that they are liable to the scrutiny and supervision of this Court, they will feel the necessity of exercising conscientious deliberation in arriving at their verdict. The same check will prevent temptation to a wilfully wrong verdict from being held out to them. It is our duty in the present case to satisfy ourselves that the verdict of acquittal is proper, or at least sustainable ; and, if we find that it is not, the law enjoins on us to set it aside, and pass the right judgment ourselves."

In view of, and to give statutory effect to, some of the decisions noted above, Act XI of 1874 was passed, S. 21 of which altered the aforesaid S. 263 of Act X of 1872 to the following form :—

"If the Court disagrees with the verdict of the Jurors or of a majority of the Jurors, *on all or any of the charges on which the prisoner has been tried*, and considers it necessary for the ends of justice to do so, it may submit the case to the High Court. *If the Court does so, it shall not record judgment of acquittal or conviction on any of the charges on which the prisoner has been tried* ; but it may either remand him to custody or admit him to bail.

The High Court shall deal with the case so submitted as *it would deal with an appeal*, but it may *acquit or convict the accused person on the facts as well as law, without reference to the particular charges as to which the Court of Session may have disagreed with the verdict* ; and if it convict him, shall pass such sentence as might have been passed by the Court of Session."

The words in italics will indicate the important alterations that were made in the law.

Cases decided under the Section as enacted in 1874 will now be noted.

In a Reference²⁰ sent up under S. 263 of Act X of 1872 by the Sessions Judge disagreeing with the verdict of guilty, the Judge had charged the Jury in these words : "You

18. Balvant v. Pendharkar (1874) 11 B. H. C. R. 137.

19. (1875) 1 B. 10.

20. Wuzir Mundal (1876) 25 W. R. 25.

will observe that there are two species of evidence in this case—first, the depositions of the witnesses S and G ; and secondly, the confessions of three of the prisoners before the Sub-Deputy Magistrate of Ranaghat. You heard the witnesses subjected to a severe cross-examination, and it is for you to say whether or not you believe them. If you think their statements worthy of credit then the prisoners' own confessions, taken as corroborative evidence, would make a very strong case. But if you are of opinion that these witnesses are not to be believed, then I advise you not to convict upon the prisoners' confessions only,—confessions, which as you have heard, they now retract." The High Court observed : "We do not understand why the case should have been submitted to the High Court ; for if there is such a thing as trial by Jury at all in the District of Nuddea it is clear that this verdict must stand. * * The Sessions Judge has recorded it as his opinion that the Jury were incompetent to deal with the case ; that they, in fact, did not understand the charges they were trying, and that the conviction seems to have been based on the prisoners' confessions. He is further of opinion that

How far witnesses are to be believed is a question within the special province of the Jury.

the principal witnesses for the prosecution broke down completely and were unworthy of credit : and that the witness S. (for committing rape etc. on whom the prisoners were tried) is a woman of loose character. But the Judge himself left it and properly left it to the Jury to consider how far these witnesses were worthy of credit ; and it was, in truth, the special province of

the Jury to deal with that question. The Judge specially charged the Jury not to convict the prisoners on their confessions only ; and we see no reason to suppose that they did convict on the confessions only. It may be that when questioned on their verdict they seemed to rely on the confessions chiefly. But that is no reason for supposing that they did not consider the evidence of the witnesses to be substantially true ; and there is nothing to show that they deemed the evidence to be false. * * The Jury are appointed by law to decide questions of

Jury to decide questions of fact ; their verdict should not be interfered with except in cases of gross and unmistakable miscarriage of justice.

fact and their verdict should not be interfered with except where there has been a gross and unmistakable miscarriage of justice. In the present instance, the Jury found a verdict such as they were entitled to do on the evidence, and on the whole case as placed before them by the Judge himself. That being so, there is no reason why we should say that they were wrong. When there is a patent and unquestionable failure of justice it may be necessary for this Court to set aside the verdict of the Jury in the exercise of the powers which the High Court has under S. 263. But so long as trial by Jury exists, the verdict of the Jury must be accepted and must stand, unless it is manifestly and certainly wrong.

A different note was definitely struck in 1877²¹ as regards the powers of the High Court to interfere under S. 263 of the Code of Criminal Procedure. It was held by the Court that a large discretionary power is vested in the High Court under that Section, that no fixed rules can be laid down for the exercise of that discretion in every instance, and that the decision in every case submitted must depend upon its own peculiar circumstances. It was so held *per* Garth, C.J. & Prinsep, J. (Markby, J. *Contra*) and it was pointed out that the rule laid down in *Wazir Mandal* (1876) 25 W. R. 25 went too

Different note struck in 1877.

21. Mukhun Kumar (1877) 1 C. L. R. 275.

far. The judgments of the learned Judges are given below *in extenso*, as they explain the principles with clearness and elaboration.

Markby J. said,—

"In this case the prisoner's brother was in his own house in the night. The only person residing with him was the prisoner. The prisoner himself, at an early hour, gave information of the murder to several persons in the village, including the village gomastah. The prisoner at first said that he did not know who had committed the murder, but on coming before the gomastah he charged Hera Lall (a neighbour) and Ramanath with having committed it. This same Hera Lall states, that on the night of the murder, the prisoner came to his house, and, standing outside, called out that he had killed his brother and asked Hera Lall to assist him in concealing the body. This is corroborated by Hera Lall's two sisters who were in another house, four or five cubits distant, and who say they heard what the prisoner said.

"Upon the evidence as recorded, there is, at it appears to me, a direct contradiction between Hera Lall and the gomastah as to whether Hera Lall reported this conversation to the gomastah immediately. But the Jury seem to have thought that the gomastah said that Hera Lall told him of this conversation afterwards. There is also, in my opinion, considerable improbability that a man who had committed a murder should communicate it to a neighbour in the manner described by Hera Lall. It was not unlikely that the prisoner, if he committed the murder, would ask Hera Lall to assist him in disposing of the body ; but he would, in all probability I think, have gone inside the house to make this request, and would have taken care not to be overheard. The Jury, therefore, had, as far as I can see, reasonable grounds for disbelieving the story told by Hera Lall.

"The other evidence in the case consists of the confession of the prisoner and the evidence of the lad, Denonath, who says that, on the day preceding the murder, the prisoner borrowed from him an axe belonging to his uncle, There is no doubt that with this weapon the murder was committed. No one could have complained if, upon the confession thus corroborated, the Jury had convicted the prisoner, but they did not do so. They unanimously acquitted him.

"The question for me is whether I am to say the prisoner is guilty in the face of this unanimous verdict of the Jury. The case, as I look at it, is essentially one for the consideration of a Jury. It depends mainly upon whether the prisoner's confession ought to be accepted as true. There can be little doubt that, if the Jury rejected the confession of the prisoner, they did so because they suspected it might have been made under the influence of the Police.

With great deference to the opinion of the Chief Justice, I think the Jury had a right to consider whether it was probable that this confession was due to the influence of the Police, though there was no direct evidence of it. I think there would be great danger if this view of the matter were not considered open in every case. It is certainly not too much to say that the Police possess great influence over the prisoners in their charge, and that they do sometimes obtain the most circumstantial confessions which are false. A remarkable case

Jury has the right to consider whether a confession is voluntary and are better qualified to judge about it.

of the kind will be found in 7 W. R., 8, and I have now before me the recorded opinion of a Sessions Judge of great experience, that witnesses are threatened by the Police in nearly every case which is investigated. If witnesses are threatened, there can be little doubt that accused persons in custody are threatened also. I think, therefore, that the Jury have a right to accept every confession coming from persons who have been in the custody of the Police with caution, and with a regard to the probability of its having been made under the influence of the Police ; and a Jury is, in my opinion, better qualified than I am to judge how far this caution is to be carried, and to determine whether a confession is to be accepted in any particular case. I do not, therefore, feel justified in saying that the Jury could not reasonably have arrived upon this evidence at a verdict of acquittal.

“With regard to the duty of Judges of this Court, in dealing with the verdict of a Jury referred under S. 263, I agree that the words of that Section leave the discretion of the Judges uncontrolled, and that we cannot lay down any fixed rules for the exercise of that discretion according to one’s own conscience. At the same time I agree generally with, and adhere to, the observations made by Phear and Morris, JJ., in 21 W. R. Cr., 4 ; by Macpherson and Morris, JJ., in 20 W. R. Cr., 73 ; by Birch, J. and myself in 20 W. R. Cr., 33 ; by Macpherson and Morris, JJ., in 25 W. R. Cr. 25 ; and by the High Court of Bombay. No doubt these observations cannot amount to more than an expression as to how the particular Judges who made them thought their discretion ought to be exercised. But dealing, as I am now, with a case of a unanimous verdict of acquittal, I adopt those observations as guide ; and what they amount to is well expressed by the Bombay High Court, that we ought not, as a general rule, to interfere, under S. 263, with the verdict of a Jury, unless it is perverse and patently wrong. Of course, I am here supposing that the verdict of the Jury has been arrived at legally and properly. In the present case, there is no suggestion of any impropriety or illegality in the verdict of the Jury. It seems to me impossible to admit the supposition that the Jury are not fit to perform their duty. They have declared unanimously that, in their opinion, the prisoner is not guilty ; and I do not feel justified in saying that that verdict should not be recorded.

“As regards the power of this Court to order a new trial in a case referred under S. 263, I do not wish to say anything, as I understand that course would not be taken in this case even if the power exists. Nor, as at present advised, am I prepared to commend that Juries should be questioned by the Judges as to the grounds upon which they base their conclusion.”

Garth, C. J.—“After a careful consideration of this case, I have come to the conclusion that, notwithstanding the verdict of the Jury, we ought to convict the prisoner of murder. If he be guilty at all, there can be no doubt as to the quality of the offence. The deceased was barbarously murdered by some one ; and the question, if question there be, is, whether the prisoner is the guilty man.

“Now, the evidence in the case consists in great measure of a confession made by the prisoner himself before the Magistrate of Burdwan on the 1st of March last.

"From that statement, and from the admitted facts of the case, it appears that the prisoner was the younger brother, and that the two brothers lived together in one small house. Very near them lived a man named Hera Lall and his two sisters, named Sarasvatee and Bidhoo, with whom the prisoner and his brother seem to have carried on an illicit intercourse. The deceased, the elder brother, had consorted with Sarasvatee, the elder sister, for several months, when he left her for the younger sister Bidhoo, still visiting the elder one occasionally. The prisoner, then a young man of seventeen or eighteen years of age, used to consort with the elder sister ; and this community of intercourse appears to have led to quarrels between the brothers.

"On Saturday, the 24th of February last, both brothers were in the early part of the day at the market ; and a dispute arose between them with reference to some pice which the deceased had given to the prisoner, and which the latter seems not to have accounted for. According to the prisoner's statement he was severely scolded by his brother for concealing these pice, and on the following morning (Sunday) he, the prisoner, borrowed an axe from a neighbour, Jadoobun Tantee, and placed it beside the door of their house. On the evening of that day he had a conversation with Sarasvatee, who, he says, advised him to kill his brother, suggesting that, if the brother were dead, she and the prisoner might live together comfortably. The prisoner then states that he and his brother went to sleep as usual in the same house ; and that, after his brother had arisen at midnight to see an eclipse of the moon and had laid down to sleep again, he, the prisoner, took the axe, and struck him with it three or four times on the head. His brother died without a word. He then went to the house where Hera Lall and his sister lived, told them what he had done, and begged Hera Lall to help him to bury the body. Sarasvatee went with him to look at it, and Hera Lall advised him to go to the gomastah of the village and say what he had done. He appears first to have gone to one or two other persons, and told them that his brother was murdered, without mentioning who had committed the murder ; and he then went to the thana with the peon early in the morning of the 26th of February, when he told the gomastah that Hera Lall and Ramanath (a friend of Hera Lall's) had murdered his brother.

"These circumstances are for the most part detailed in the prisoner's statement before the Magistrate, in what appeared to me the most natural and circumstantial manner, with these remarkable words, "but God knows that I am the murderer, and only I." The Magistrate observes upon this :—

"N. B.—The accused, a slight miserable looking youth, raises both his hands up in an earnest manner in saying this, a statement which he seems to make with all sincerity."

"This confession of the prisoner is corroborated most fully and satisfactorily, as it seems to me, by the evidence adduced for the prosecution. Hera Lall states that the prisoner came to his house soon after midnight on the night in question, and told him, from outside the door, that he had killed his brother, and begged him to come and help to bury him. The sisters Sarasvatee and Bidhoo confirm Hera Lall's statement and also speak to the circumstances which led to the quarrel between the two brothers ; and, lastly, Jadoobun is called, the neighbour

from whom the axe was borrowed and he confirms the prisoner's statement in this respect. There is not the least doubt that this axe was the instrument with which the murder was committed. The deceased's head was cut in such a manner as could only have been the result of cuts by some such instrument ; and the axe, covered with blood, was lying by the side of the deceased. The surgeon's evidence is, to my thinking, conclusive upon this point.

"Then, here we have a complete circumstantial and apparently genuine confession of the offence by the prisoner. The Magistrate before whom it was taken is convinced of its truth and sincerity. That confession is confirmed by what seems to me perfectly reliable evidence. The Sessions Judge has recorded his opinion that the verdict of the Jury is wrong ; and I confess it appears to me almost impossible to account for the verdict of the Jury upon anything like reasonable grounds.

"It is true that the prisoner, on the morning of Monday, the 26th, laid the blame upon Hera Lall and Ramanath, and that he afterwards repeated that charge before the Sessions Judge ; but he said on that occasion that he never made the statement at all before the Joint-Magistrate, which was taken down from his own lips and also that what he did say was suggested to him by the Police.

"I confess I cannot see the slightest ground for believing this statement of the prisoner ; and it is quite uncorroborated by any evidence in the case. We have nothing before us, nor had the Jury any evidence before them, to induce the belief that the Magistrate made any mistake, or that the prisoner's confession was extorted from him by improper conduct on the part of the Police ; and, in the absence of such evidence, I cannot think that we have any right to assume that either the Magistrate or the Police were guilty of any breach of duty. In this respect, I quite agree with what is said by Mr. Justice Macpherson in the 25 W. R. Criminal Rulings, 26. It is difficult, no doubt, to account for the conclusion at which the Jury arrived. They do not appear to have thought anything of the supposed contradiction between the evidence of Hera Lall and of the gomastah, to which my learned brother Mr. Justice Markby appears to attach some weight ; nor, as far as I can discover, is there any reasonable ground for their disbelieving the prisoner's confession or the other evidence in the case. It is very possible, as has been suggested by my learned brother Mr. Justice Prinsep, that they may have been influenced by what seems a too prevalent notion, namely, that no conviction for murder is justifiable without the evidence of some eye-witness of the crime ; and the summing up of the learned Judge, at the trial, seems to point to some such difficulty. But, whatever the causes operating upon the mind of the Jury may have been, I myself cannot see any reasonable grounds for their arriving at the verdict of acquittal.

"In the consideration of this case two questions have suggested themselves to my learned brothers and myself, which appeared to be of very general importance—first, how far this Court is justified, in a case referred under S. 263 of the Criminal Procedure Code, in convicting a prisoner contrary to the express and unexplained finding of a Jury ; and secondly, whether this Court has power under that Section to order a new trial.

How far High Court is justified in convicting contrary to the express and unexplained finding of a Jury. Power of High Court to order new trial.

"With regard to the first of these questions, it appears to me that, by that Section, the Legislature intended to vest in the High Courts a very large discretion ; and that it would be improper for us, if not impossible, to lay down any fixed rule by which that discretion should be controlled. The verdict of a Jury, who are the legally constituted judges of facts, and have the advantage of seeing the case tried and of hearing the witnesses examined, ought always, in my opinion, to command its proper weight ; and the more unanimous their verdict may be, and the less likely to have been induced or influenced by prejudice or error, the more entitled it should be to our respect and consideration. But there may be many occasions where, as it seems to me, little or no weight should be attached to their verdict ; as, for instance, where out of a Jury of five, three are of one way of thinking, and two of another and the presiding Judge agrees with the minority, or where it is manifest, from the conduct of the Jury or otherwise, that their minds have been influenced by a prejudice which has prevented them from forming a correct judgment.

Not prepared to go so far as 25 W. R. Cr. 77.

Each case should depend on its own circumstances.

"In the exercise, therefore, of my own discretion in cases coming before us under this Section, I should not go so far as to hold with Mr. Justice Macpherson and Mr. Justice Morris (in 25 W. R., Criminal Rulings, 77) that "the verdict of a Jury should not be interfered with, except where there is a gross and unmistakable miscarriage of justice ;" nor, on the other hand, should I consider myself justified in deciding any case according to my own views of the evidence, without giving to the verdict of the Jury its proper weight. Each case, in my view of the Section, should depend on its own circumstances.

"As regards the power of the Court to grant a new trial, I am inclined to think, as at present advised, that they have no such power. The language of the Section appears to mean that, where the verdict of the Jury is not in accordance with the opinion of the Judge, it should be referred to the High Court, upon consideration of the whole case, law and fact, and with regard to the finding of the Jury, to determine the question finally. It is remarkable, as observed by my brother Mr. Justice Prinsep, that the present Code of Criminal Procedure, as passed in 1872, contains no provision for the re-trial of an appeal, and that it is only by the addition to S. 280 (introduced by S. 28, Act XI of 1874) that the power now exists in an Appellate Court "to order the appellant to be re-tried" ; and that, though some parts of S. 263 were amended at the same time, no special provision was made for extending the power to order a re-trial to cases submitted to the High Court under S. 263. In other parts of the Act if such a power is intended to be exercised, it is given in express terms. (See Ss. 272, 284, 297, 299 and 448 of the Criminal Procedure Code). Moreover, it will be found that in this Section the High Courts are empowered to decide the case finally, without reference to the particular charge upon which the prisoner was formally tried in the Court below ; and it seems clear that this provision would not be applicable to a case sent back for re-trial.

"In this particular case, I confess I should not be disposed to send back the case for re-trial, even if we had the power to do so. There appear to me very cogent reasons against such a course."

Prinsep, J.—“In this case, in which there can be no doubt that a man has been murdered in a most deliberate and brutal manner, the accused has been acquitted by an unanimous verdict of the Jury ; but the Sessions Judge who presided at that trial has disagreed with that verdict, and has submitted the case to the High Court under S. 263 of the Code of Criminal Procedure.

“The Sessions Judge, in recording the grounds of his opinion for submitting the case (S. 464), has stated, “ I do not think it necessary to add anything to the evidence as it stands on the record, and to my summing up, except to say that to my mind there appears to be no reasonable doubt that the prisoner committed the murder.”

“We have no means of learning the grounds on which the Jury came to an unanimous verdict of acquittal. We must, therefore, assume that the Jury either wholly disbelieved the evidence on the record, or that they considered it as insufficient to establish beyond all reasonable doubt the prisoner's guilt.

“I can find no good reason for either of these opinions.

“The prisoner confessed in a full and circumstantial manner to the committing Magistrate, his personal demeanour as then recorded was remarkable, and when the confessional statement was read over to him he appears to have interposed an additional statement on a point, thus showing that he was fully cognizant of the proceedings then being taken, that that statement of the course of events emanated from himself, and that it was a true statement of what had occurred.

“So far as the facts stated on that confession could be confirmed, they have been confirmed by the evidence of the witnesses. There certainly is the apparent contradiction noticed by Mr. Justice Markby, but to me this is susceptible of explanation, and it is shown from the record of what took place when the Sessions Judge proposed to clear this contradiction by calling other witnesses, that the Jury not only attached no importance to it but considered that the statements made by Hera Lall and the gomastah were not really contradictory.

“I see nothing absolutely improbable in the prisoner's going to Hera Lall after committing the murder. He went to ask for Hera Lall's assistance to hide the body under the ashes in the furnace house of his pottery ; and, if we believe his own statement that he was induced by one of Hera Lall's sisters to commit the murder, the fact of his going there receives a further explanation.

“That he subsequently denounced Hera Lall as the murderer is accounted for by the Sessions Judge as the result of deliberation after an interval to collect his thoughts, but his acts between going to Hera Lall and the gomastah seem to be more consistent with his own guilt rather than with the truth of his suspicion of Hera Lall. His first object seems to have been to get out of trouble himself, and then, when he had recovered from the shock of his crime, to accuse another, the nearest neighbour, and one who had declined to help him out of the difficulty. There is, moreover, no apparent motive

on the part of Hera Lall to commit this offence, for his sisters had for some time been living with the two brothers without any remonstrance on his part. It is suggested that the Jury disbelieved the prisoner's confession made to the Magistrate but denied on the Sessions trial. If they did so, in my opinion they acted most capriciously, and not in the proper exercise of their duty. I have already stated on what ground the confession bears the impress of truth. That it was voluntarily made has been certified by the Magistrate, and this is also borne out by the prisoner's own demeanour, to which I have adverted. But in the Sessions Court the prisoner said, "I did not say to the Magistrate a word of what I have now heard read. They (the Police) tied and beat me, and tutored me what to say."

"The reported cases of this country may occasionally show instances of false or extorted confessions, and to us, who are strangers, it may seem highly improbable that any confession should be voluntarily made so soon after the commission of a crime; but, in my opinion, we are not therefore justified in discarding every confession that may be made, on hypothetical grounds of improbability or of its having been improperly obtained, when, opposed to such grounds, we have tangible evidence of its truth and of its having been voluntarily made. No doubt, the frequency of confession in this country has made the people and those who are concerned in the administration of justice as Judges or Jurors, disinclined to attach that weight to them which they would otherwise be entitled to receive; but when there is, on the face of a confession, as there is in the present case, evidence of its being a truthful and voluntary confession and when it is corroborated by all the evidence which the nature of the case admits, I think that the verdict of a Jury in disregarding such confession is a wrong verdict, and that in the ends of justice that verdict should not receive its ordinary legal effect.

"I am inclined, however, from a long experience of trials by Jury, to attribute this verdict to an idea too prevalent among Jurors in this country, that in cases of homicide the direct evidence of an eye-witness is necessary for conviction; but that is only speculative. In either view of the reasons on which we must assume the verdict was founded, it is, in my opinion, contrary to the evidence which the Sessions Judge has believed, and which I can find no sufficient reason to reject as unreliable.

"I am satisfied to accept the rule laid down in the case that each case coming before this Court under S. 263 should depend on its own circumstances, as to the weight to be given to the verdict of a Jury from which the Sessions Judge has disagreed. I admit that it is impossible to lay down any inflexible rule on the subject, but I have the strongest objection to assigning any particular grounds for any verdict, the correctness of which is impugned by a Sessions Judge. It would be far more satisfactory if the rule contained in the second clause of S. 263 were applied to such cases so as to enable a Sessions Judge to ascertain the grounds of a verdict before deciding to submit a case to the High Court. He would be better able to decide whether the case should be submitted, and the High Court would be in a position to determine whether the verdict was a reasonable or an

Impossible to lay down any inflexible rule.

unreasonable and perverse verdict. I am aware that this proposition is opposed to the opinion expressed in the case reported in 21 W. R. 1; but in my opinion, the terms of the law do not necessarily exclude this course of procedure, and to me, notwithstanding the objections stated by Mr. Justice Phear, it seems highly desirable in the proper administration of justice."

"With the opinions of so many learned Judges against me, I submit my own opinion with much diffidence; But I conceive that, in a case coming before the High Court under S. 263, it is the duty of the High Court to weigh the evidence irrespective of the verdict, it is the duty of the High Court to weigh the evidence irrespective of the verdict, and it is only when there is some reasonable doubt as to the credibility of that evidence that such a verdict should be accepted. If, however, we had some record of the grounds on which a doubtful verdict was based, we should have no difficulty in dealing with such cases. A comparison between the present and the former Code of Criminal Procedure will show that under the latter the verdict of a Jury was absolute, and that either unanimity or something more than a bare majority of the Jurors was necessary for a legal verdict, whereas the present Code expressly permits the High Court to consider the facts in a case referred for confirmation of a sentence of death, and to take fresh evidence in it, quite irrespective of the verdict of a Jury; and it has further given power under S. 263 to decide a case on the facts when the Sessions Judge disagrees from a verdict. It seems to me that, by allowing a verdict of a bare majority of the Jurors, by enabling a Sessions Judge to suspend giving effect to a verdict from which he disagrees, by empowering the High Court to convict or acquit irrespective of such a verdict, and by also empowering them to pass final order on a death case on the facts as well as to take fresh evidence, it was the intention of the Legislature to make the full force that would ordinarily attach to the verdict of a Jury dependent on the concurrence, or rather absence of disagreement, on the part of the Sessions Judge; and that in a case coming before the High Court under S. 263 the impugned verdict should receive much less weight than a verdict of a Jury used to receive under the former Code of Procedure, or now receives in England under the practice or English lawyers.

"Whether we could order a re-trial in a case coming before us under S. 263, it is not, strictly speaking, necessary to determine; but, after careful consideration of the terms of the last clause of S. 263, and an application to it of the several Sections relating to appeal, I am of opinion that the opening words of that clause refer merely to the procedure regarding appeals, such as service of notices, whereas the powers of the High Court are defined by that clause itself, and are limited to an acquittal or conviction on the evidence on the record. No good result would, I conceive, arise from any re-trial in such a case on evidence which had become stale, and before a second Jury who could not be otherwise than prejudiced in their verdict by the verdict already delivered on a previous trial.

"I concur with the Chief Justice in convicting the prisoner of culpable homicide amounting to murder.

Garth, C. J.—As the majority of the Court is in favour of a conviction, we accordingly find Mukhun Kumar guilty of culpable homicide amounting to murder, by causing the death of Judhisteer Kumar, an offence punishable under S. 302 of the Indian Penal Code ; and, as there are no extenuating circumstances, we sentence the said Mukhun Kumar to be hanged by the neck until he is dead.

The Sessions Judge in referring a case under 263 Cr. P. C., against the verdict of the majority (four out of five) of the Jury acquitting the prisoner on a charge of an attempt to commit rape stated : "I told the Jury plainly that I am of opinion that the offence charged is proved. There is nothing whatever to show that the case has been got up, and that witnesses for the prosecution have spoken otherwise than truthfully. Neither is there any reasonable ground for the belief that the prosecutrix in any way connived in the attempt made on her chastity.

High Court interfered where evidence was believable though Jury had thought otherwise.

The High Court (Jackson & Cunningham, JJ.) convicted the accused, being of opinion that the evidence for the prosecution was fully worthy of belief and consistent with probabilities and said : "The question raised by the accused is not whether the complainant was or was not a consenting party—an issue which is often extremely difficult to decide, but whether the entire story for the prosecution is false, the defence being alike."²²

In *Hurree Narain Mookerjee*²³ relying on *Queen v. Sham Bagdee* 20 W. R. 73, a reference under S. 263 Cr. P. C. was discharged with these remarks :—"In this case it may be that another Jury would have come to a different conclusion on the evidence, but at the same time there is no doubt that there are reasons for suspicion sufficient to warrant the Jury in disbelieving the witnesses in the present case, and in giving the prisoner the benefit of the doubt raised by inconsistencies in their evidence. This is not a case in which we can say that the verdict of the Jury is certainly unreasonable and perverse. Therefore it seems to me, following the general practice of this Court, that we ought not to interfere."

No interference unless verdict is certainly unreasonable and perverse.

In a case of murder the Jury acquitted the prisoners. They considered that they would not be justified in convicting the accused in the absence of the direct evidence of the eye-witnesses to the murder ; they declined to act on the prisoner's own confession though they could assign no reason for disbelieving it ; they found it proved that the deceased was in prisoner's company on the day of the occurrence, and that the prisoner in some manner, not satisfactorily explained by him, became possessed of money that day, the deceased having had a golden amulet to obtain which the prisoner confessed that he had drowned the deceased. The Judge referred the case under 263 Cr. P. C. The High Court agreed with the verdict of the Jury and acquitted the prisoner, though on the ground that the confession which was taken under S. 122 did not bear the certificate of the Magistrate

Where confession held inadmissible and rest of the evidence not sufficient, verdict of acquittal not interfered with.

22. In the matter of Tiiuckdharee (1878) 2 C. L. R. 1.

23. (1878) 2 C. L. R. 518.

and the defect in such a confession could not be cured by the examination of the Magistrate in the Court of Session as the defect in an examination of the accused under S. 364 by the Committing Magistrate could be and that the confession was accordingly inadmissible and further that without the said confession there was not sufficient evidence to justify the conviction (*Emp. v. Hari Kisto Biswas* (1879) 5 C. L. R. 209).

The prisoner was the plaintiff in a suit to recover money on a bond. The suit was referred to a Vakil for arbitration. The arbitrator examined witnesses to ascertain the amount due to the plaintiff at his house. One of the witnesses having stated that payment of a certain sum was endorsed on the bond, the arbitrator directed his clerk to fetch the bond; it was placed on the floor beside the arbitrator. The prisoner who disputed the amount of the alleged payment endorsed on the bond, objected to the bond being shown to the witness. The objection was overruled by the arbitrator; upon this the prisoner suddenly took up the bond, and ran out of the house without saying a word. The clerk followed the prisoner and stopped him. The arbitrator followed and requested him to return; prisoner declined to return and went away. The prisoner was charged with an offence under S. 380 I. P. C. The Jury found him not guilty. The Judge referred the case under S. 263 Cr. P. C., being of opinion "that the verdict was contrary to the most conclusive and overwhelming evidence and that the Jury were reluctant to convict the prisoner owing to the fact that he was a Brahman and a Ghanapati (learned in the Vedas)". The High Court held that the obvious inference from the circumstances was that considering himself aggrieved by the decision of the point against him, he determined to prevent effect being given to it and with that intention removed the document and subsequently refused to produce it, and that he had been guilty of secreting a document which he might be lawfully compelled to produce in evidence before a public servant and convicted him under S. 204 I. P. C.²⁴

The principles on which the High Court will act in a case under S. 263 of Act. X of 1872 were again discussed in the case *In the matter of Dhunum Kazeer*.²⁵ In that case Norris, J., after referring to *Mukhun*²⁶ and *Khanderao Bajirav*²⁷ observed as follows:—

"The principles which guide the English Courts in deciding whether a new trial should be granted upon the ground that the verdict was against the weight of evidence were discussed in the recent case of *Solomon v. Bitton*²⁸ where the Court of Appeal said: "The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory, as being against the weight of evidence, ought not to depend on the question whether the learned Judge who tried the action was or was not dissatisfied with the verdict, or whether he would have come

*Solomon v.
Bitton*

24. Ghanapati (1881) 3 M. 261 : 1 Weir 409.

25. (1882) 9 C. 53.

26. (1877) 1 C. L. R. 275,

27. (1875) 1 B. 10.

28. L. R. 8 Q. B. D. 176,

to the same conclusion as the Jury, but whether the verdict was such as reasonable men ought to have come to". The Judge, in his report referring the case to us, makes no complaint of the conduct of the Jury on the ground of prejudice; he complains only that the verdict was against the weight of evidence, and he seeks to substantiate that complaint

Is the verdict, which is sought to be set aside such as reasonable men ought to have come to.

by calling attention to the answers given by the Jury to certain questions put to them by him after they had returned their verdict. I shall presently refer to these answers. Endeavouring to guide myself by the light of the decision I have quoted, I have to ask myself—Is this verdict, which is sought to be set aside, such as reasonable men ought to have come to?

In order to answer this question, it is necessary to consider what the prosecution were bound to prove against the accused in order to justify a conviction. It was incumbent upon the prosecution to prove (i) that the document, alleged to have been used by the accused, was, in fact, a forged document; (ii) that it was used by the accused; (iii) that at the time it was used by the accused they knew or had reason to believe that it was a forgery; (iv) that, at the time they used it, knowing, or having reason to believe, that it was forgery, they did so fraudulently or dishonestly. If any one of these points was left in doubt, the Jury were bound to acquit. A verdict of acquittal would be such as reasonable men ought to have come to".

At this stage it is necessary to refer to an important decision of the Bombay High Court²⁹ (Westropp, C. J. and Melvill, J.), which subsequently led to the amendment of the law as regards References from the verdict of the Jury in the Code of 1882. The Sessions Judge disagreeing with the verdict of the majority (4 to 7) of the Jury, accepted the verdict, convicted the prisoner in accordance therewith and recorded a finding in the following words: "The Court disagrees with the verdict of the majority. But as it is entirely a case depending on the appreciation of the evidence and the habits and customs of the natives, and as they must be more familiar with the motives which actuate these people and what they would be likely to do than a foreigner, the Court will not send up the case under S. 263". The prisoners appealed to the High Court. The High Court said,—"This case depends upon the 4th and 5th clauses of S. 263 of the Criminal Procedure Code. These clauses are not very clearly drawn; but taking them together, as we are bound to do, in order to ascertain the meaning of the legislature, we think that the "dissent"

Complete dissent of the Judge from the Jury is necessary.

spoken of in the fourth clause must be such a complete dissent as to lead the Judge to consider it necessary for the ends of justice to submit the case to the High Court. There being no such complete dissent in this case we think that the conviction and sentence must stand. This decision is not in

conflict with our decision in *Imp. v. Hari Ghanu* where we held that Government might appeal against an acquittal by a Jury when the Judge differed from the Jury but did not consider it necessary for the ends of justice to refer the case to the High Court." In the case of *Imp. v. Hari Ghanu* the prisoner was tried by a Jury before a Sessions Judge. The Jury

returned a verdict of not guilty with which the Sessions Judge disagreed. He, however, acquitted the prisoner (16th November 1877) but did not think it necessary to refer the case to the High Court under S. 263 of Act X of 1872. The Government of Bombay thereupon preferred an appeal against the Sessions Judge's order of acquittal and the High Court (Westropp, C. J. & Melvill, J.) admitted the appeal, holding that Government has a right to appeal against an acquittal by a Jury where the Judge differed from the Jury, although he did not consider it necessary to submit the case to the High Court. On the receipt of the records of the case the High Court (Melvill & Kemball JJ.) on the 21st March 1878 found, on the evidence, the prisoner guilty of the offence charged and sentenced him to transportation for life.

Act X of 1882, S. 307, altered the law in some important respects. That Section ran in these words :

Act X of 1882,
S. 307.

"If in any such case the Sessions Judge disagrees with the verdict of the Jurors, on all or any of the charges on which the accused has been tried, so completely that he considers it necessary for the ends of justice to submit the case to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed.

"Whenever the Judge submits a case under this Section, he shall not record judgment of acquittal or of conviction on any of the charges on which the accused has been tried, but he may either remand the accused to custody or admit him to bail.

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise as on an appeal ; but it may acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it ; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session."

The alterations (1) insisted upon such a complete disagreement that a Reference is considered necessary for the ends of justice ; (2) made it obligatory in such a case to make a Reference (The word 'shall' being substituted for the word 'may') ; (3) required the Judge in the case of a verdict of acquittal to state the offence which he considers to have been committed ; (4) made it clear that the High Court may exercise any of the powers which it may exercise on an appeal ; (5) empowered the High Court to act as the Jury could have acted, in view of the charges that had been framed ; (6) limited the last mentioned power to such only of the charges as was or were placed before the High Court, for consideration. These alterations had merely the effect of embodying the principles that had been laid down in judicial decisions as governing these References, but left as unsettled as ever the crucial question as regards the finality or otherwise of the verdict of the Jury on questions of fact. The cases under this new Section, namely S. 307 of Act X of 1882, proceeded much on the same lines as they did under S. 263 of the earlier Act, as will be seen from those noted below.

A prisoner was charged under Ss. 302 and 304 I. P. C., and the Judge at the trial added a charge under S. 325 I. P. C. The Judge directed the Jury that in the event of their finding the charges under Ss. 302 and 304 I. P. C., unsustainable, they might find the prisoner guilty under S. 325. The Jury unanimously acquitted the prisoner under the charge framed under S. 302 and a majority of them acquitted him also of the charge under S. 304 ; but a majority of them found him guilty under the charge framed under S. 325. The Judge disagreed with their finding as regards the charge framed under S. 304 and referred the case under S. 307 Cr. P. C. The High Court refused to interfere with the verdict on the ground that the verdict could not be said to be manifestly erroneous, the Judge having heard the evidence and having expressed his opinion to the Jury that they might find the prisoner guilty under S. 325.³⁰

No interference
unless verdict
manifestly
erroneous.

The Bombay High Court also held that in a Reference under S. 307 Cr. P. C., the High Court will interfere only when the verdict was clearly and manifestly wrong. Nanabhai Haridas, J. said : "It has been the uniform practice of this Court not to interfere with the verdict of a Jury except when it is shown to be clearly and manifestly wrong. I am far from satisfied that it is such in this case. On the contrary, I am disposed to think that it is quite right, and that no other could have been safely arrived at upon the evidence". Jardine, J., said—"I am of opinion that here are many considerations which might induce a Jury of reasonable men to take the confession as a whole and refrain from convicting the prisoner of murder."³¹

Verdict must be
clearly and
manifestly wrong.

Whether an element of 'perversity' is necessary in order to set aside the verdict of the Jury was considered by the Calcutta High Court in an elaborate judgment in the case of *Queen Emp. v. Iwari Saho*.³² There it was held that in the exercise of its powers under S. 307 of the Code, the High Court will form and act upon its own view of what the evidence in its judgment proves ; but in doing so the opinion of the Sessions Judge, no less than the verdict of the Jury, is entitled to its proper weight. Prinsep, J. said :—"It is argued for the accused that the verdict cannot be set aside unless it can be shown to be perverse and manifestly wrong, and that, as there are certainly infirmities in the evidence for the prosecution in the present case, the Jury cannot be said to have been perverse in rejecting the whole case made against the prisoner. *The Empress v. Dhunum Kazee* (9 Cal 53), *Queen-Empress v. Mania Dayal* (10 Bom 497) and *Solomon v. Bitton* (L. R. 8 Q. B. D. 176) were cited by the pleader for the accused. The Vakeel for the prosecution relied on *Empress v. Mukhun Kumar* (1 C. L. R. 275) amongst others. *Empress v. Dhunum Kazee* (9 Cal. 53) and *Queen-Empress v. Mania Dayal* (10 Bom 497) were cases in which the Court did not disagree with the verdict. In each case, the Court, on the whole, approved of the verdict. They are not authorities for the position that the Court, although disagreeing with the verdict, will not set it aside unless it appears to be perverse. In *Reg. v. Khanderao Bajirao*, West, J., says, referring to Section 263 of the former

Whether element
of perversity is
necessary.

30. Jacquet (1884) 11 C. 85.

31. *Mania Dayal* (1886) 10 B. 497.

32. (1887) 15 C. 269.

Code of Criminal Procedure : "The whole case is opened up * * * the functions of both Judge and Jury are cast upon the Court, and this differentiates our position very widely from that of the Courts in England." That very learned Judge adds : "Notwithstanding this difference, however, * * * we still desire to be guided, as far as may be, by the analogies of the English law. It is a well-recognized principle that the Courts in England will not set aside the verdict of a Jury unless it be perverse or patently wrong, or may have been induced by the error of the Judge. We adhere generally to this principle, notwithstanding our large discretionary powers." We think that the argument founded on these words may be pressed too far. No doubt, the manner in which English Courts deal with the verdict of a Jury in Civil Cases, as for instance *Belcher v. Prittie*, (10 Bing. 408) must always, to some extent, assist the Courts in this country in the exercise of the duty imposed upon them by law of considering under Section 307, in Criminal Cases, the verdict of a Jury here ; a body similar in some respects to the Jury in England, and intended, so far as can be, to discharge similar functions. But we think the degree of influence to be given to this consideration must depend in some measure upon the closeness of the analogy which may exist between the nature and functions of the English and of the Indian tribunals. Apart from the circumstances that the English law on this subject relates to civil, and the Indian to criminal cases exclusively, the analogy is not always a close analogy. The unanimous verdict of a Jury of twelve is, in respect of weight, a different thing from the decision by a majority, or even from the unanimous decision of a body of five or seven or nine. The Indian Courts are expressly made Courts of Appeal on facts ; the function of the English Courts in this branch of the law go no higher, in cases where verdicts are set aside, than the ordering of a new trial. The present Lord Chancellor says in the last case decided in the House of Lords on this subject—*Metropolitan Railway Co. v. Wright* (11 App. Cas. 165) : "If a Court, not a Court of Appeal in which the facts are open for original judgment but a Court which is not a Court to review facts at all, can grant a new trial whenever it thinks that reasonable men ought to have found another verdict, it seems to me that they must form and act upon their view of what the evidence in their judgment proves". We refer to this passage, because it makes, in vigorous language, in the early portion of it, the distinction between the two classes of tribunals to which the English and the Indian Courts do, in this matter respectively, belong : and perhaps in the latter indicates that Courts which have to decide on facts can hardly abstain from examining all the evidence and forming their own view of it. The case in which these observations were made seems rather to modify the terms of the old English rule as stated in *Reg. v. Khanderao Bajirao* 1 Bom 13. The word 'perverse' is no longer approved. Lord Fitzgerald in the *Metropolitan Railway Co. v. Wright* (11 App. Cas. 156) says : 'If my recollection does not mislead me, we have departed in this House in several instances from the old rule which introduced the element of 'perversity,' and have substituted for it that the verdict should not be disturbed unless it appeared to be not only unsatisfactory, but unreasonable and unjust. The question, thus, for your Lordships' consideration, is whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust." Lord Herschell, L. C., says,—“The verdict ought not to be disturbed unless it was one which a

Jury viewing the whole of the evidence reasonably could not properly find",—a rule which should apply by analogy to the consideration of cases under Section 307. The principles laid down by the Lords would seem somewhat less peremptory and confined than one framed upon the terms of the older cases. But we own that we should find it difficult, apart from any authority in this Court, to hold (at any rate as to Section 307) that any rule founded upon such an analogy should be adopted in restriction of the exercise of the discretion of the Courts. There is an essential difference between the functions of the Courts in the two cases. The English Court has no power of finding on facts in any case ; that is a power expressly given to, or rather imposed upon, the Indian. A complete analogy between the two will arise, if the latter refuses to exercise that power. In *Reg v. Khanderav Bajirav* (1 Bom 13) it is to be observed that the language of the Court is very carefully guarded, more so than that which has been (at least in the headnotes of cases) subsequently used—"We desire to be guided, as far as may be, by the analogies of English law," "We adhere generally to this principle," and later on "It is our duty to satisfy ourselves that the verdict is proper or at least sustainable." The learned Judge then considered the following cases :—

Mukhun Kumar (1 C. L. R. 275) ; *The Queen v. Ram Churn Ghose* (20 W. R. Cr. 33) ; *The Queen v. Sham Bagdi* (13 B. L. R. App. 19 : 20 W. R., Cr. 73) ; *The Queen v. Haroo Manjhee* (14 B. L. R. App. 1 : foot-note 21 W. R., Cr. 4) ; *The Queen v. Wazir Mundul* (25 W. R. Cr. 25). *The Queen v. Nabin Chundra Banerjee* (13 B. L. R. App. 20 : 20 W. R. Cr. 70) [All noted *supra*].

After quoting the judgment of Garth, C. J., in *Mukhun Kumar* (1 C. L. R. 275) the learned Judge said,—“We agree in thinking that this passage states, as closely as it would be safe to do, the sort of weight which should be given to the verdict of a Jury in case referred under Section 307 ; and would but add to what is said by the Chief Justice this further consideration that, having regard to the terms of the Section, the opinion of the Judge, who has had, as well as the Jury, an opportunity of observing the witnesses, and has also had an opportunity of watching the whole course of the trial, must have due weight given to it. In *Mukhun Kumar's Case* (1 C. L. R. 275) the Court set aside an acquittal, convicted of murder, and sentenced the accused to be hanged. It was in every way a decision which must be supposed to have been present to the mind of the Legislature when the new Code of Criminal Procedure was passed. There is no indication, however, in that Code of any intention that the discretion of the Court should be limited in the manner approved of in some of the older cases, and disapproved of in *Mukhun Kumar's Case* (1 C. L. R. 275), and we think that the Legislature must have intended that the powers conferred by Section 307 should be fully,—as they must, no doubt, be cautiously,—exercised. We have referred to a large number of unreported cases under Section 263 of the Code of 1872 subsequent to 1878, and under Section 307 of the present Code of 1882, the latest being in February of this year before Petheram, C. J., and Cunningham, J., with the result that the Judges have not expressed themselves so as to limit the exercise of the discretion of the Court in each case coming before it.”

The question as to the powers of the High Court under S. 307 of Act X of 1882 came up incidentally before the Allahabad High Court in a case³³ in which the effect of Cl. (6) of S. 8 of Act III of 1884 was also considered. The said Clause ran thus: "The provisions of this Code relating to the procedure in a trial by a Jury before a Court of Session shall, as nearly as may be, apply to every trial under this Section as if the District Magistrate were a Sessions Judge and the accused had been committed to his court for trial." The objection taken was that, assuming the District Magistrate to be competent to submit the case, references under Section 307 would lie only on a point of law, and the High Court could not reverse the verdict except on the ground of misdirection by the Judge, or of misunderstanding on the part of the Jury of the law as laid down by him. It was contended that this followed from the words in Section 307, "In dealing with the case so submitted, the High Court may exercise any of the powers which it may exercise on an appeal"; these powers, in cases of trial by Jury being defined and limited by Section 418 and Section 423 (d) of this Code. Reference was made to Section 263 of the Code of 1872 and the wording of the last paragraph of the Section and that of the last paragraph of Section 307 of the present Code. Straight, J. observed,—

"For one moment, speaking as to the policy of this provision, I have no doubt it was felt by the Legislature that, in this country wherever the Jury system was introduced, such system being a novel one, and its application being likely to be attended, in its infancy at least, by considerable difficulties, it was imperatively necessary to provide some safeguard against miscarriage of justice, so that, in cases where the Jury delivered a perverse or obtuse verdict, the District Judges should be afforded an opportunity of reporting to this Court, as the ends of justice required, that such perverse finding should be set right by this Court. This Court, in my opinion, has distinct power to interfere in such cases under Section 307, and I do not think that this power is in any way affected by S. 418 or anything that appears in the appeal Chapter. That Section solely and entirely relates to appeals, either by the accused who has been convicted, or by the Local Government who are impeaching an order of acquittal. Mr. Hill in his argument conceded what I pointed out, namely, that on an appeal from an acquittal by a Jury by Government, such an appeal would probably be governed by Clause (d) of Section 423, and it would have to be limited to questions of law, i.e., misdirection by the Judge or misapprehension of the directions of the Judge by the Jury on points of law. But this is not so here; this is a case directly falling within Section 307, and I do not think that the clear provisions of that Section are in any way curtailed or cut down by Sections 418 and 423; and, though a reference by a Magistrate under Section 307, read in conjunction with Section 8 of Act III of 1884, it stands on an identical footing with cases where the District Judge disagrees with the verdict of a Jury; and I hold that we can question the verdict of the Jury, and disturb it, if it is proper to do so.

A decision of considerable constitutional importance was pronounced by the Bombay

33. Mc Carthy (1887) 9 A. 420 : 7 A.W.N. 39.

High Court in the case of *Queen Emp. v. Dada Ana*.³⁴ The accused Dada Ana and Jiba were charged with murder under S. 302 I. P. C. The Jury unanimously acquitted Jiba. As regards Dada, the majority of the jurors found him not guilty. The Sessions Judge differed so completely with the Jury that he thought it necessary for the ends of justice to refer the case to the High Court under S. 307 Cr. P. C. The learned Judges differed in opinion as to the verdict to be entered in the case of the accused Dada while they agreed in acquitting Jiba. Their opinions will be found in the following extracts from their judgments. Jardine, J., observed as follows :—

“Assuming, for the sake of argument, that the four jurymen, who had doubts, were wrong on this point, the Court has to see whether on this supposition the crime of murder was brought home to each of the prisoners. In coming to an opinion on this point, the Court has, I consider, to give its due weight to that of the Sessions Judge and of the juror who differed from the majority. As a matter of practice, however, I concur in the words used by Nanabhai, J. in the fully argued case of *Queen-Empress v. Mania* (10 Bom. 497 at p. 502) that ‘it has been the uniform practice of this Court not to interfere with the verdict of a Jury, except when it is shown to be clearly and manifestly wrong.’ I have considered the judgment in *Empress v. Mukhun Kumar* (1 C. L. R. 275) and in *Queen-Empress v. Itwari* (15 Cal. 269) and while I have no wish to contest the proposition that in references under Section 307 the discretion of the High Court to interfere may be as wide as stated by West, J., in *Regina v. Khandarav* (1 Bom. 10 at p. 13), I do not know of any authority which condemns the rule of practice above stated, I am not aware of any good reason for diverging from it, and I doubt whether, in any ordinary case, a Division Bench ought to do so, in the present state of the authorities. Since the decision of *Regina v. Khandarav*, a change in the words of the law has been made, which was apparently unnoticed at the hearing of the recent Calcutta case, *Queen-Empress v. Itwari* (15 Cal. 296). Under Section 263 of the Code of 1872, the Sessions Judge might submit the case to the High Court, if he considered it necessary for the ends of justice to do so. Under Section 307 of the present Code, the Sessions Judge shall submit the case if he disagrees with the verdict “so completely that he considers it necessary for the ends of justice to do so.” The introduction of the words ‘so completely’ appears to me to indicate

‘So completely’ indicates leaning of Legislature towards the finality of the verdict.

the leaning of the Legislature towards the finality of the verdict of a Jury. If, as may possibly be argued, Section 307 and Section 423, clause (d), require the High Court to satisfy itself about the verdict, and to either acquit or convict and preclude re-trial, this argument as to the intention of the Legislature becomes of some importance. The rule we have followed so long seems to

me quite conformable to the most recent doctrine expressed by the House of Lords as regards verdicts in civil cases. In *The Metropolitan Railway Company v. Wright* (11 App. Cas. 152) Lord Herschell, L. C., said (p. 154) : “The case was one unquestionably within the province of a Jury ; and, in my opinion, the verdict ought not to be disturbed unless it was one which a Jury, viewing the whole of the evidence reasonably, could not properly find.” Lord Watson concurred. Lord Fitz-Gerald said (p. 155) ; “The question for your Lordships’ consideration is

whether the evidence so preponderates against the verdict as to show that it was unreasonable and unjust." *Per* the present Lord Chancellor Lord Halsbury (p. 156) : "If reasonable men might find (not 'ought to' as was said in *Solomon v. Bitton* (L. R. Q. B. D. 176) the verdict which has been found, I think no Court has jurisdiction to disturb a decision of fact which the law has confined to Juries, not to Judges". This case was cited before the Judicial Committee of the Privy Council in *Commissioner for Railways v. Brown* (13 App. Cal. 133)."

Candy, J. observed :—

"I now turn to the case of Dada.

"It is clear, upon the authority of decided cases, that this Court will not interfere unless the verdict of the Jury be found to be manifestly erroneous (*per* Mitter, J., in *Queen-Empress v. Jacquiet* 11 C. 85 and to the same effect *per* Nanabhai Haridas, J. in *Queen Empress v. Mania Dayal* 10 Bom. 497 at p. 502) ; but when the error is manifest, it is none the less incumbent on us to interfere. It is our duty to satisfy ourselves that the verdict of acquittal is proper or at least sustainable ; if we find that it is not, the law enjoins on us to set it aside and pass the right judgment ourselves (*Regina v. Khanderav Bajirav* 1 Bom. 10). Now, in the present case, I understand from my brother Jardine that he has not doubt, from the evidence on the record, that Kuber died from *dhatara* poison, and *dhatara* was detected in Kuber's stomach. The Jury in the former trial unanimously found that Kuber died from *dhatara* poison administered to him in his food. I am of opinion that no reasonable doubt can be had on these points. But these are the points on which the Jury in the present case had doubts ; and the Sessions Judge said these doubts 'would be incomprehensible but for the experience I have gained in this Court that, as a rule, Juries in this city will snatch at any excuse, however frail, rather than pronounce a plain decision on the facts in murder cases.' A former Sessions Judge of Ahmedabad, of equal judicial experience, once expressed a similar opinion (10 Bom. at p. 499). It is, therefore, specially incumbent on us to scrutinize the conduct of the Jury, to see whether 'their minds have been influenced by a prejudice which has prevented them from forming a correct judgment' (*per* Garth, C. J., in *Empress v. Mukhun Kumar* 1 C.L.R. 275 at p. 282). It is unnecessary to quote authorities as to how far interference is permissible with verdicts of juries in civil cases in England. "Here the law on these subjects is different, and the difference is very important. * * * On a reference by the Sessions Judge, the whole case is opened up. * * * The functions, both of the Judge and Jury, are cast upon the Court, and this differentiates our position very widely from that of the Courts in England (*Regina v. Khanderav Bajirav* 1 B. 10 at p. 13)."

"Admitting, then, in the present case, that the Sessions Judge was wrong in putting any question to the Jury after the verdict was delivered, disregarding entirely the answers to the questions, dealing solely with the evidence and the verdict itself, looking simply at probabilities, and applying my general experience of men and affairs, I cannot find any reasonable doubt as to Dada's guilt."

As consequence of the difference of opinion between the Judges composing the Divisional

Court, the case was referred, under Section 429 of the Code of Criminal Procedure, to the Chief Justice. Sargent, C. J., said,—

“The finality of the verdict of the Jury is, by Section 307 of the Code of Criminal Procedure, made subject to the power of the Sessions Judge who presides at the trial (when he disagrees with the verdict of the jurors so completely that he considers it necessary for the ends of justice) to submit the case to the High Court, which is, in dealing with the case, to exercise any of the powers which it may exercise

on an appeal. This is a most important departure from English law and practice, and was undoubtedly dictated by the circumstance that trial by Jury in this country was an experiment, which it was necessary to safeguard

against a miscarriage of justice, by allowing the case to be referred under certain circumstances to the highest judicial authority. There is, therefore, no true analogy between the discretionary powers thus conferred on the High Court under the above Section, and that which the Courts of Law in England have sparingly exercised in interfering with the findings of a Jury in civil actions by directing a new trial on the ground of the verdict being against the evidence, and the practice, therefore, of the latter Courts cannot be resorted to as affording a rule in the exercise of the powers conferred on the High Court by Section 307. This is, I believe, the

Departure from English law and practice.

Uniform practice not to interfere with verdict except when it is shown to be clearly and manifestly wrong.

gist of Mr. Justice West's remarks in *Regina v. Khanderao* 1 Bom. 10 at p. 13. However, I entirely agree with Mr. Justice Nanabhai, whose long experience is entitled to great weight, that it has been the uniform practice of this Court not to interfere with the verdict of a Jury, except when it is shown to be clearly and manifestly wrong (*Queen-Empress v. Mania Dayal* 10 Bom. 497), and such a practice ought, in my opinion, to be followed.”

In refusing to make a reference under S. 307 Cr. P. C., the Judge said : “The Jury found the prisoners not guilty of theft. It is a question of credibility and I do not think it incumbent on me to send the case to the High Court, though being personally doubtful whether the verdict is justified by the evidence. There will probably be an appeal.” An appeal was preferred by the Crown, and the High Court said, “Section 307 leaves the referring of a case to the High Court entirely to the discretion of the Judge, for it is only when he disagrees with the verdict of the Jury so completely that he considers it necessary for the ends of justice to submit the case to the High Court” that he should do so. This discretion should,

Discretion of making a Reference should always be exercised in favour of making a Reference when the verdict is not supported by the evidence, as that is the only way by which miscarriage of justice by a perverse verdict may be remedied.

however, always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way in which the miscarriage of justice by a perverse verdict of a Jury, which is of too frequent occurrence, can be remedied by the High Court.³⁵

A Jury returned a verdict of guilty against the accused in a trial for dacoity. The Session Judge accepted the verdict although he said he did not agree with it and charged the Jury for an acquittal ; he observed that he could not refer the verdict as perverse, since there was evidence against the accused which it was open to the Jury to believe. The accused appealed

to the High Court on the ground (*inter alia*) that the Sessions Judge "ought to have referred the case to the High Court under the Criminal Procedure Code, Section 307." The High Court said :—"This is another case of a conviction by a Jury of persons accused of dacoity against the opinion and advice of the Sessions Judge, although he declines to refer the case to the High Court under S. 307 Cr. P. C. ; we have no power to interfere, however absurd or wrong we may think the verdict to have been. There has been no misdirection by the Sessions Judge, and there is evidence against the prisoners if the Jurymen choose to believe it. The sentence also is not too severe, supposing the prisoners are guilty. The prisoners, of course, may bring their case to the notice of His Excellency the Governor in Council, if they be so advised. Our duty under the present state of the law is to dismiss the petition and confirm the conviction and sentence. (The prisoners moved His Excellency the Governor in Council under S. 401 Cr. P. C., and the unexpired portion of their sentence of 10 years' rigorous imprisonment was remitted and they were set at liberty).³⁶

High Court has no power to interfere with verdict unless there is misdirection which would justify an appeal, or unless the Judge refers, however wrong or absurd the verdict may be.

It is not necessary that the Jury's verdict must be patently wrong. High Court is to form its own opinion on evidence after giving due weight to the opinions of jurors and Judge.

In *Nagan v. Q. E.*,³⁷ Muthusami Aiyar and Wilkinson JJ., observed :—"Some of the learned Judges of the Calcutta High Court have held that a verdict ought not to be set aside unless it is clearly and patently wrong and unsustainable, or unless it is established in the clearest possible manner that the Jury have wholly miscarried in their conclusions in the case. With all respect to the learned Judges we think that to hold thus unduly limits the powers given to this Court by the Legislature. Where a case is referred to the Court under S. 307, the Court may exercise any of the powers which it may exercise on appeal under S. 423. The whole case is before the Court and it is for the Court to say whether upon the evidence the accused should be convicted or acquitted. Due weight must undoubtedly be given to the verdict of the Jury, unless it appears to be not only unsatisfactory and unjust but also unreasonable, as well as to the opinions of the Judge who has heard the evidence.

In *Queen Emp v. Devji Govindji*³⁸ Jardine, J. said : 'Before approaching the merits I refer again to *Dada Anna's Case* and to *Queen-Empress v. Mania* 10 Bom. 447 as showing the settled practice of this Court not to interfere with the verdict of a Jury unless it is shown to be clearly and manifestly wrong. These are the words in *Queen-Empress v. Mania*, which Sargent, C. J., adopted in *Dada Anna's Case*. I sat in both, and it is well-known that in my opinion, in which Mr. Justice Ranade has in sundry cases concurred, a verdict, whether correct or not, ought to be considered a proper and not a perverse verdict, if it is one which reasonable men might find. The case ought not to come before this Court under Section 307 unless the Judge disagrees so completely with the Jury that he considers it necessary for the ends of justice to submit the case. This view taken in *Imperatrix v. Bhawani* (2 Bom. 525), by Westropp, C. J., and Melvill, J., was adopted in the Code of 1882. There

A verdict ought to be considered a proper and not a perverse verdict, if it is one which reasonable men might find.

36. Chinna Tevan (1890) 14 M. 36 : 2 Weir 390.

38. (1895) 20 B. 215,

37. (1892) 2 Weir 390.

are many cases where two juries, both composed of reasonable men, unswayed by any prejudice, may take different views, exactly as two Judges may differ. One kind of mind more readily believes in testimony, more readily draws inference of crime. Another kind of mind hesitates to believe, pauses and gives the benefit of doubt. Each draws on its experience of life, and thus we find wide differences between Judges and juries, between the Judge that tries the case and the Judges of appeal. In criminal cases such things as confessions, the testimony of accomplices, the possession of stolen property, are weighed in different scales by different minds. The same occurs in Civil cases ; e.g., where indiscreet familiarities of a married woman

Harshly judging set of men may say 'yes' while a more lenient or cautious set may say 'no'.—No finality if verdict is interfered with the such cases.

are proved, are they evidence of adultery ? A harshly judging set of men might say, yes. A more lenient or cautious Jury might say, no ; but if you allowed a new trial in the one case, you would have to do the same in the other, as the Judge Ordinary points out in *Gethin v. Gethin*, (2 S. and T. 560), and so you would never get to finality. Dada Anna's case is a sample where two different Sessions Judges differ from two different juries and on the

reference, under Section 307, the two Judges of the High Court differ, and at length a third Judge decides the matter.

As the result of the aforementioned decisions and of the recommendations of the Jury Commission, Act XIII of 1896 S. 3 was passed, introducing some important changes in the law. The Section ran thus :—

3. (1) In Section 307 of the said Code for the words "so completely that he considers it" the words "and is clearly of opinion that it is" shall be substituted.

(2) In the same section for the words, "but it may" the words "and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury" shall be substituted.

The result of the aforesaid amendment was the following : 1st. Instead of the Judge disagreeing so completely that he considers it necessary for the ends of justice to submit the case, it would be sufficient if he disagrees and is clearly of opinion that it is necessary for the ends of justice to do so ; 2nd. The High Court shall, subject to this that it may exercise any of the powers that it may exercise on an appeal, acquit or convict, after considering the entire evidence and after giving due weight to the opinion of the Judge and the Jury. The first of the above points seems to be a mean between the position contemplated by Act X of 1872, S. 263, which merely required a disagreement and an opinion on the part of the Judge that a Reference is necessary for the ends of justice, and that contemplated by Act X of 1882 which required a complete dissent and a similar opinion ; Act XIII of 1896 requiring a disagreement and a clear opinion that it is necessary for the ends of justice to make a reference. The Section, amended as above, was incorporated in the Code of 1882. It is somewhat difficult to comprehend with exactitude the precise significance of this change ; and judicial opinion has accordingly varied as to what it is that the legislature really meant. As already said, widely divergent views have been taken, as the cases given below will show.

One of the important decisions of the Calcutta High Court is the case of *Ans.*

v. *Lyall*³⁹ in which the effect of the Amendment of 1896 was considered. Several accused persons were tried, charged with offences under Ss. 147, 325 read with 149 and 343 of the Penal Code and S. 210 of the Assam Labour and Emigration Act. One of them, Lyall, was acquitted by the Jury of the offence under S. 343 I. P. C. and S. 210 of the Assam Labour and Emigration Act. Another, Rajoni was acquitted by the Jury of the offence under S. 210 of the Assam Labour and Emigration Act and convicted under S. 343 of the Penal Code. As regards the two charges under Ss. 147 and 325 read with 149 I. P. C. the Jury unanimously acquitted Lyall, Rajoni and all the other accused persons. The District Magistrate who tried the case under S. 451 Cr. P. C. disagreed with the unanimous verdict of the Jury and, being of opinion that all of them with the exception of one D should be convicted under Ss. 147 and 325/149 I. P. C. and feeling that the error would cause such a miscarriage of justice as necessitated a reference, referred the case to the High Court under S. 307 Cr. P. C. Prinsep J. said :—"Mr. Pugh contends on the authority of several reported cases, that we are bound to act in accordance with the unanimous verdict of the Jury unless it

Effect of amendment of S. 307 by Act XIII of 1896. The High Court must consider the evidence.

is shown to be perverse or clearly or manifestly wrong. Since those cases, however, the terms of S. 307 of the Code of 1882, under which the most recent of the cases quoted were decided, have been altered by the amending Act of 1896, which expressed the law in the language in which it stands.

In the present Code S. 307 Cl. (3) declares that in dealing with the case, such as is now before us, the High Court may exercise "any of the powers which it may exercise on an appeal, and, subject thereto, it shall after considering the entire evidence and after giving due weight to the opinion of the Sessions Judge and the Jury acquit or convict the accused" etc. No cases under the law thus expressed have been cited to us, which are in accordance with the authorities on which Mr. Pugh relies. It seems to us that we are now bound to consider the entire evidence in the case, and we are then required to give due weight to the opinions of the Sessions Judge and the Jury and not to rely only on the verdict of the Jury. Without considering the evidence, the High Court would not be in a proper position to give due weight to such opinions. It is not necessary for the prosecution to show that the opinions of the Jury are perverse or clearly and manifestly wrong, as was held in the cases cited to us which were decided before the law was amended in 1896 and expressed as it now stands. We now proceed to consider the entire evidence laid before us." In this case the High Court, while passing sentences on convicting the accused persons of offences in

'Placed before it' in S. 307.

respect of which the District Magistrate who held the trial under S. 45 Cr. P. C. had acquitted them and the Jury had differed, left it to the District Magistrate to pass whatever (if any) sentence he might think proper in respect one of the

Difference between original criminal jurisdiction and jurisdiction as a Court of Reference.

charges as to which the District Magistrate had agreed with the Jury—saying that that charge was not before them. It was pointed out that the jurisdiction which the High Court exercises in hearing a case submitted to it under S. 307 of the Criminal Procedure Code is not its Original Criminal Jurisdiction, but it hears the case as a Court of Reference in the exercise of the jurisdiction vested

in it by Cl. 28 of the Letters Patent, which is co-extensive with its Appellate Jurisdiction. The difference between a Judge of the High Court sitting in the exercise of its Original Criminal Jurisdiction and a Division Bench sitting on a Reference under S. 307 in a Criminal matter is well-recognized.

The Judge charged the Jury to the effect that all the witnesses were accomplices and unworthy of credit and that they had not been corroborated by any independent evidence ; the Jury convicted the accused ; the Judge referred the case for acquittal. The High Court declined to interfere with the verdict, holding that the witnesses whom the Judge regarded as accomplices were not such.⁴⁰ Where the case was one of grave suspicion and yet the Judge had differed from the verdict of acquittal, the High Court declined to interfere.⁴¹

The High Court declined to interfere under S. 307 Cr. P. C., with the verdict of the Jury in a case in which the Jury refused to accept the opinion of an expert, the case being one which related to certain thumb impressions which were blurred and many of the characteristic marks therefor far from clear ; thus rendering it difficult to trace the features enumerated by an expert, as showing the identity of the impressions. Geidt, J. said : "A Jury may decline to accept the opinion of an expert without the corroboration of their own intelligence as to the reasons which guided him to his conclusions with respect to the identity of the impressions."⁴²

In *Srinarain Prasad v. E.*⁴³, it was said that although the High Court was bound, in dealing with the Reference, to give due weight to the opinion of the Judge and the verdict of the Jury, still it could decide for itself the question of guilt or otherwise of the accused.

In *Imp. v. Haji Wd. Jamal*⁴⁴ it was contended on behalf of the accused that the High Court should not interfere with the verdict of the Jury under S. 307 Cr. P. C., unless it was clearly and manifestly wrong and such that reasonable men could not find on the facts in evidence ; and support for this contention was claimed in the series of cases decided by the Bombay High Court (10 Bom. 497, 15 Bom. 452, 20 Bom. 215). *Held* that a reference to the Bombay cases showed that the rule that the High Court should not interfere with the verdict of the Jury unless it was shown to be clearly and manifestly wrong was a rule based not so much on the construction of the Section as on the settled practice of the Court, and that the aforesaid cases were all prior to the Amending Act of 1896. *Held*, following 29 Cal. 128, that "the law, as it stands, requires the High Court to consider the entire evidence and to give due weight to the opinions of the Sessions Judge and the Jury • • Neither the existence of any traceable doubts in favour of the accused, nor any consideration leading to dispel such doubts, is to be ignored and the only question that can then remain is a question which must arise in

40. Deodhar Singh (1900) 27 C. 144.

41. Nuri Sheikh (1902) 29 C. 483 : 6 C.W.N. 596.

42. Abdul Hamid (1905) 32 C. 759 : 9 C.W.N. 520 : 2 Cr. L.J. 259.

43. (1907) 11 C.W.N. 715 : 5 Cr. L.J. 484.

44. (1906) 4 Cr. L.J. 160 n.

every Criminal case whether there is or is not room for such reasonable doubt as would entitle the accused to an acquittal."

In a case under Ss. 147 and 325 read with S. 149 I. P. C., the accused put in a written statement that he was a man of nearly 75 years of age, infirm and old, he had lost full vigour and was incapable of taking a part in a riot. There were witnesses who proved that the accused had given orders to beat. The Jury saw the physical condition of the accused and came to the conclusion that he was incapable of taking part in a riot and declared him not guilty. The Judge made a reference under S. 307 Cr. P. C. The High Court discharged the reference saying : "The gentlemen of the Jury are, in a matter like this, more competent than we are to decide whether an accused of the physical condition which we have just referred to was capable of taking part in a riot or whether he could have had the courage to be at a place where a riot would take place. The Jury were unanimously of opinion that the accused was not guilty and we have no doubt that they based their opinion on what they saw of the accused. We have not had that advantage. We cannot pronounce, merely because a number of witnesses have said that the accused had given the order to beat, that the Jury were wrong in their verdict. At all events, the accused is entitled to the benefit of the doubt which the Jury had in their minds and we are bound to give effect to the opinion of the Jury in a case like this."⁴⁵

High Court not confined to points of difference between Judge and Jury, but the whole case as regards the particular accused is open.

In hearing a case under S. 307 Cr. P. C., the Court is not to be confined to points of difference between the Judge and the Jury, but the whole case is thrown open to the Court, and it must be decided after giving due weight to the opinions of the Judge and the Jury.⁴⁶

The following judgment⁴⁷ was delivered in a very important case under S. 307 Cr. P. C., in which many of the earlier authorities, reported as well as unreported, were discussed. Caspersz, J. said :—"The circumstances of the case are altogether special. I have already mentioned the inconsistency involved in the verdict of the Jury. It may be added that the trial in the Court of Sessions occupied more than six weeks of the time of the Sessions Judge and the Jury. It would have been an obvious disregard of our duty to have thrown out this reference merely because it might be argued upon the face of the charge to the Jury, that the verdict was not altogether an unreasonable one. The first case to which I may refer is that of *Emperor v. Chirkua*.⁴⁸ That, no doubt, is in favour of Mr. Chaudhuri's contention. But it was a decision of Mr. Justice Richards (sitting with Banerjee, J.) in a reference where neither party was represented and where no authorities were considered. With the greatest

45. Kamar Ali (1907) 6 C.L.J. 253 : 6 Cr.L.J. 359.

46. Chandra Krishna (1908) 10 Bom. L.R. 632 : 8 Cr. L.J. 143.

47. Annada (1909) 36 C. 629 : 13 C.W.N. 757 : 9 C.L.J. 638 : 10 Cr. L.J. 32 : 2 I.C. 497.

48. Chirkua (1905) 2 A.L.J. 475 : 2 Cr. L.J. 357 [See this case explained in Ishri (1905) 2 A.L.J. 271 (note).].

It is not necessary that the letter of Reference and the Judge's charge to the Jury should show that the verdict was unreasonable in order that the Reference may be entertained. Once the Reference is made, the High Court must consider the entire evidence.

respect for the learned Judge, I think that his judgment is in direct conflict with the plain wording of Section 307, Code of Criminal Procedure. In his commentary on the Code, Sir Henry Prinsep observes :—

“The result of legislation seems to be that, unless the Sessions Judge accepts it, the verdict of a Jury in a Sessions Court outside a Presidency town has no longer the ordinary force of a verdict of a Jury, and that if the Sessions Judge disagrees with a verdict and submits the case to the High Court, the determination of the case lies with the High Court after full consideration of the evidence and after giving due weight to the opinions of the Sessions Judge and of the Jury.”

“In the unreported case of *Emperor v. Anaruddin Biswas and Poresb Mondal* (unreported) the learned Judges (Holmwood and Ryves, JJ.) observe—“We cannot hold that the Jury were not justified in taking the view that they did or at least that it was not open to the Jury to take the view that they did. That in a reference under Section 307 is quite sufficient.” But they go on to consider the case on its merits. In this connection, I shall presently notice another and a matured decision of the same learned Judges in which they have more clearly expounded the law. In the case of *King-Emperor v. Anes Mirda* (unreported) Mr. Justice Geidt, sitting with Mr. Justice Woodroffe, heard the evidence and, on a consideration of that evidence, they expressed themselves as not prepared to say that the majority of Jury were wrong in refusing to act on it. The learned Judge added that “there is nothing to show that the verdict of the Jury was perverse or that they refused to convict the accused on any other ground than the bonafide belief that it would not be safe to convict them on the evidence which was placed before the Court.” In my opinion, the learned Judge did no more than give due weight to the verdict of the Jury in that reference. The last unreported case is that of *Emperor v. Prosonno Kumar Ganguly* (unreported) which was decided by Mr. Justice Mitra and myself. There also the merits were entered into : and the opinion of the Sessions Judge was considered, and it was pointed out that the element of doubt in the case which, in the opinion of the Sessions Judge, was 1 in 177,000, was in reality much greater and the judgment concluded with the observations that “the circumstances were very suspicious and it might be that the accused was guilty. But it cannot be said that the guilt of the accused is morally certain.” If any of the unreported cases had been clear authority for the extreme contention which has been submitted to us they would have found a place in the law reports. There are reported cases on the subject and I proceed to consider those. In the case of *Emperor v. H. Lyall*⁴⁹ the reference was against a unanimous verdict of the Jury acquitting the accused. Mr. Pugh, Counsel for Lyall, the principal accused in the case, cited authorities to the effect that the High Court must act in accordance with the unanimous verdict of the Jury unless it was shown to be perverse or clearly and manifestly wrong. The learned Judges (Prinsep and Stephen, JJ.) overruled his contention, and pointed out that the terms of Section

49. Lyall (1901) 29 C. 128 : 6 C.W.N. 253.

307 of the Code of 1882, had been altered by subsequent legislation and they observed :—
 "It is not necessary for the prosecution to show that the opinions of the Jury are perverse or clearly and manifestly wrong, as was held in the case cited to us which were decided before the law was amended in 1896, and expressed as it now stands." In a somewhat later case, *King-Emperor v. Chidghan Gossain*⁵⁰ Mr. Justice Stevens, sitting with Mr. Justice Harington, pointed out that "the Sessions Judge was not justified in taking up the time of this Court by making a reference in a case in which the evidence for the prosecution was, on his own showing in his charge to the Jury, so open to hostile criticism as to justify the Jury in regarding it with suspicion." Nevertheless, the learned Judges went very fully into the merits of the case, and they certainly did not reject the reference merely because the Sessions Judge ought not to have made it.

"The last case to which our attention has been called is a decision of Mr. Justice Holmwood and my learned brother (Mr. Justice Ryves) in *Emperor v. Abdul Rahaman*,⁵¹ where the two cases which have just been cited were considered. It admits of no doubt that this is a fuller exposition of the law than that enunciated in the unreported case of *King-Emperor v. Anaruddin Biswas* and *Poresh Mondal*, (unreported) to which reference has been made.

"The contention of the learned Counsel that the case of Abdul Rahaman should not have been referred under Section 307 of the Cr. P. Code, because the Sessions Judge himself, in his charge to the Jury, warned the Jury that they should certainly pause and consider a particular circumstance in the evidence of the prosecution, and that it was, therefore, fairly open to the Jury to acquit the accused, was not accepted, and the learned Judges proceeded to consider the evidence in the case which appeared to be clear and convincing, and the result of the reference was that the accused was convicted. I have now dealt with all the cases and, in my opinion, there is no real conflict of decision, or want of uniformity in the procedure adopted by this Court on the hearing of a reference under Section 307 of the Code. It is obvious that, in every case, even where the verdict was unanimous, the Court proceeded to consider the merits and to hear the evidence. I have indicated how the opinions of both the Sessions Judge and of the Jury, including a minority of the Jury, are entitled to due weight in accordance with the express language of Section 307 of the Code. The procedure adopted by Mr. Donough in the present case was perhaps unusual, but regard being had to the length of the Sessions Judge's charge to the Jury and to the evident want of arrangement and method in marshalling the materials presented to the Jury, we thought that the learned Counsel for the Crown should not be pressed to place the charge before us at an early stage of the hearing. It was subsequently placed before us, and the contention of Mr. Donough was that the Sessions Judge did not put the evidence against the accused sufficiently strongly before the gentlemen of the Jury. We have carefully read and considered the charge for ourselves, and even if it had been read to

50. (1902) 7 C.W.N. 135.

51. (1908) 9 C.L.J. 432; 10 Cr. L.J. 57; 2 I.C. 593.

us at the very commencement of the hearing, we should not have been in a position to say that the Jury were justified in acquitting the accused. In the circumstances of this case, it was impossible to limit the hearing or to confine it to a consideration of the charge of the Judge and the points made therein for or against the case for the prosecution. There may be cases in which a Sessions Judge unnecessarily makes a reference under Section 307; but in such cases, the Crown would certainly not press the reference, and so it might be disposed of on a bare consideration of the charge to the Jury and of the material passages in the evidence. * * Mr. Chaudhuri's contention is that if it can be shown to this Court on behalf of the accused that on a perusal of the Letter of Reference of the Sessions Judge under Section 307, Cr. P. C., and of his charge to the Jury, the verdict of acquittal, (whether unanimous or divided) was not unreasonable, this Court could not, or at any rate should not go into the evidence and examine the case on its merits, but must, having due regard to the opinion of the Jury, reject the reference.

"It seems to me this contention goes much too far, and is not supported by any one of the cases, reported or unreported, to which he has referred. Among other cases, which have been duly considered by my learned brother, he relies on the unreported case of *Emperor v. Anaruddin* (unreported) to which I was a party. That case is no authority for his proposition, for there we did examine the whole record, and, in the result, arrived at the conclusion that we should not disturb the unanimous finding of the Jury. In that case the Judge considered that the statements made by the accused were, "confessions" of her guilt. We pointed out that they were not, but on the contrary were "pleas in avoidance." In that case the scope of Section 307 was not, as far as I recollect, commented on in argument or in issue. It was a peculiar case on its facts and the Judge had misinterpreted the statements of the accused. No authorities were cited and considered, and it was not a considered judgment. In however general terms the judgment may have been couched, it is no authority for the proposition now contended for. Personally, I now think the latter part of the judgment has been expressed too widely. I adhere to the opinions expressed in the considered judgment which I delivered in the case of *Emperor v. Abdul Rahman* (unreported) in which Holmwood, J., concurred, in which the scope of the Section was in issue, and in which authorities were cited and considered."

In *Emp. v. Sheikh Neamatulla* (1913) 14 Cr. L.J. 556 : 21 I.C. 156 it was said that a Court would be slow to interfere with a unanimous verdict of a Jury unless a clear case is made out, that under S. 307 Cl. (3) Cr. P. C., it is not to the opinion of the Jury alone that the High Court have to give due weight, but also to the opinion of the Sessions Judge, that where there has been a misdirection (omission to tell the Jury that from possession with the accused of articles which were with the murdered man at the time of the murder it should be presumed not merely that the accused was concerned with theft of the articles but also with the murder) it may detract from the value of the verdict.⁵²

Court would be slow to interfere with unanimous verdict unless a clear case is made out.

52. *Neamatulla* (1913) 17 C.W.N. 1077 : 14 Cr. L.J. 556 : 21 I.C. 156.

In a case of circumstantial evidence, if the facts on a reasonable hypothesis are not inconsistent with innocence, verdict of acquittal should not be set aside.

In a case of circumstantial evidence it being found that the facts, on a reasonable hypothesis, are not inconsistent with the innocence of the accused, the High Court discharged the reference, observing that to justify a reference the verdict must be manifestly wrong and followed *Queen v. Sham Bagdi* 13 B. L. R. App. 19 : 20 W. R. Cr. 73.⁵³

The Lower Burma Chief Court in *Emp. v. Rotiya*, held following *Emp. v. Lyall* (29 C. 128 : 6 C.W.N. 253), and *Q.E. v. Pratab* (25 C. 852 : 2 C.W.N. 593) that in a reference under S. 307 Cr. P. C., the High Court has all the powers of an Appellate Court and should form its own opinion after giving due weight to the opinion of the Judge and the Jury.⁵⁴

It is not necessary to show that the verdict is perverse and unreasonable before it can be set aside ; but as the Jury are judges of fact, before their verdict is set aside it must be established that the conclusion come to by them does not follow from the evidence in the case.⁵⁵ In this reference under S. 307 Cr. P. C., there was a difference on the merits of the case between Spencer J. and Seshagiri Aiyar, J. and, the case was referred to a third Judge, Ayling, J., who agreed with Seshagiri Aiyar, J. and acquitted the accused.

Even if the High Court would arrive at a different conclusion for itself the question is whether the verdict was a reasonable one, that is to say one which a body of reasonable men could arrive at.

In a reference under S. 307 Cr. P. C., all that the High Court has got to decide is whether the verdict of the Jury was a reasonable verdict which a body of reasonable men could arrive at, having regard to the evidence, irrespective of the question whether the High Court itself would arrive at the same conclusion after hearing the case.⁵⁶

Not necessary to justify a reference that the verdict should be perverse.

It is not necessary to justify a reference that the verdict of the Jury should be perverse ; it is sufficient that the Judge should be clearly of opinion that reference is necessary for the ends of justice.⁵⁷

Where there was evidence on the record which would support the conclusion arrived at by the Jury, though there was evidence also the other way, the verdict of the Jury could not be said to be perverse or erroneous.⁵⁸

No interference unless verdict unreasonable, even if the High Court may not entirely agree with it.

The High Court on a reference under S. 307 Cr. P.C., is very reluctant to interfere with the unanimous verdict a Jury and if that verdict is not unreasonable and can upon the evidence be supported it ought to be accepted even though the High Court may not wholly agree with it.⁵⁹

53. Surnamoyee (1913) 41 C. 621 : 14 Cr. L. J. 660 : 21 I.C. 900.

54. Kotiya (1914) 7 Bur. L.T. 290 : 15 Cr. L. J. 513 : 24 I.C. 601.

55. In re Irula Sadayan (1915) 16 Cr. L. J. 440 : 29 I. C. 72.

56. Ananda (1916) 21 C. W. N. 435 : 18 Cr. L. J. 551 : 39 I. C. 695.

57. Ismail Sarkar (1918) 23 C. W. N. 747 : 19 Cr. L. J. 830 : 46 I. C. 846.

58. Asgar Mandal (1918) 22 C. W. N. 811 : 20 Cr. L. J. 20 : 48 I. C. 500.

59. Pramatha (1919) 30 C. L. J. 503 : 21 Cr. L. J. 266 : 55 I. C. 282.

Not improper to make a reference on a minor charge though a major charge may have failed, not on the ground of evidence being false but being insufficient.

There is no impropriety in making a reference under S. 307 Cr. P. C., in respect of a minor charge against a verdict of acquittal thereon, where the Judge has accepted the verdict of acquittal on the major charges, in a case where the prosecution on such major charges has failed not because of the evidence proving them to be false but because it was insufficient to sustain them.⁶⁰

It is not for the High Court to judge of the case on its merits but only to see whether the verdict of the Jury should be set aside.

In *Emp. v. Sukhu Bewa* (1911) 25 Cr. L. J. 165 it was said; "It is not for us to judge of the case on its merits * * but all we have to see is whether the verdict of the Jury ought to be set aside".⁶¹

Where Judge and Jury are agreed on a question High Court will not enter into it.

Where a Judge and Jury are agreed on a particular question the High Court will not enter into that question on a reference under S. 307 Cr. P. C.⁶²

To justify interference verdict must be manifestly wrong.

High Court will interfere only when it is satisfied that the verdict is so manifestly wrong that it ought to be set aside.⁶³

The view which the Jury may have taken was not considered unreasonable and it was said: "It must be further noted that the learned Judge in his letter of reference to this Court

If the view of the Jury on a question of fact is one that was open to them to take, High Court will not interfere.

said, "I do believe that witnesses have to a certain extent been tutored to make a consistent story, but I am convinced to my own satisfaction that the original story they had to tell was true, and that the embellishments which led to minor contradictions do not vitiate it." The learned Judge may be right.

But the Jury were the judges of the facts, and having regard to the direction of the learned Judge it is impossible for this Court to hold that the Jury were not entitled to take the view that it would not be safe to convict the accused.⁶⁴

No interference merely because another view is possible.

The verdict of the Jury must not be set aside lightly; due weight must be given to it; and when it is set aside, it must be upon a very substantial ground and not merely upon the ground that another view of the evidence might have been taken.⁶⁵

Act XVIII of 1923, S. 81, introduced a few more alterations with the result that

60. Hari Das (1922) 37 C. L. J. 34 : 24 Cr. L. J. 674 ; A. I. R. 1923 C. 108 : 73 I. C. 770.

61. Sukhu Bewa (1911) 38 C. L. J. 155 : 25 Cr. L. J. 165 : 76 I. C. 389 ; Ahirannessa Bibi (1923) 27 C. W. N. 1xiii (n).

62. Profulla (1922) 50 C. 41 : 24 Cr. L. J. 763 : A. I. R. 1923 C. 453 : 74 I. C. 267.

63. Nriya Gopal (1922) 38 C. L. J. 1 : 24 Cr.

L. J. 897 : A. I. R. 1924 C. 317 : 75 I. C. 145 [following Sham Bagdi (1873) 13 B. L. R. App. 19 : 20 W. R. 73 and Surnamoyee (1913) 41 C. 621 : 14 Cr. L. J. 660 : 21 I. C. 900].

64. Sristidhar (1922) 37 C. L. J. 30 : 25 Cr. L. J. 748 : A. I. R. 1923 C. 97 : 81 I. C. 236.

65. Punit Chain (1922) 1922 P. 218 : 23 Cr. L. J. 421 ; A. I. R. 1922 P. 348 : 67 I. C. 581.

S. 307 as amended up to date runs in these words, the amendments made by the last mentioned Act being in *italics* :—

307 (1). If in any such case the Judge disagrees with the verdict of the Jurors, or of a majority of the Jurors, on all or any of the charges on which *any accused person* has been tried and is clearly of opinion that it is necessary for the ends of justice to submit the case *in respect of such accused person* to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and, when the verdict is one of acquittal, stating the offence which he considers to have been committed, *and in such case, if the accused is further charged under the provisions of Section 310, shall proceed to try him on such charge as if the verdict had been one of conviction.*

(2). When the Judge submits a case under this section, he shall not record judgment of acquittal or conviction on any of the charges on which *such accused* has been tried, but he may either remand *such accused* to custody or admit him to bail.

(3). In dealing with a case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and, subject thereto, it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict *such accused* of any offence of which the Jury could have convicted him upon the charge framed and placed before it ; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

The only two points noticeable in this amendment are : 1st. It is the case of the particular accused in respect of whom there is difference between the Judge and the Jury that is to be referred ; and 2nd. The provision relating to the charge under S. 310 Cr. P. C. was introduced. The amendments made it clear (what had already been held in *K. E. v. Babur Ali* (1915) 42 C. 789; 19 C. W. N. 584 : 16 Cr. L. J. 321), that the *case of any of the accused* in respect of whom the Judge disagrees with the verdict is to be referred (any other accused, in respect of whom Judge agrees with the Jury, is to be convicted and sentenced or acquitted, as the case may be) ; and if the accused, whose case is thus referred, is further charged under the provisions of S. 310, the Judge shall proceed to try him on such charge as if such verdict had been one of conviction. The latter amendment is made to enable the High Court to pass a suitable sentence forthwith if it convicts the accused and to remove the inconvenience which was pointed out in *E. v. Kandasami* (1904) 30 M. 134. Nothing was said as regards the finality or otherwise of the verdict of Jury on questions of fact, and so the same difference in judicial views on the point continued to exist ; though it seems that the Courts since then have, generally speaking, veered round to the old view which was not to interfere with the verdict unless it was perverse or unreasonable, as the cases noted below will show.

Referring to the case law on the subject, it has been said : “This Court is first called upon to consider the entire evidence. The Court has then to give due weight to the opinion of the Sessions Judge and to the opinion of the Jury. The measure of the relative weight attached to these two factors cannot be crystallized into an inflexible formula. The answer must

depend upon the circumstance of each case. But the trend of judicial decision has been in favour of preference of the unanimous verdict of Juries on whom the duty is imposed by S. 299

Queen V. Sham Bagdi 13 B. L. R. App 19; 20 W. R. 73 still holds the ground, though due weight must be given to the Judge's opinion as required by the Statute.

to decide which view of the facts is true. The weight to be attached to the verdict of the Jury is, however, necessarily diminished when the verdict is not unanimous. On the other hand when the Judge accepts the verdict of the Jury as to some of the accused and not as to the others his opinion is weakened in a corresponding measure. But, as we have said, the view propounded in the case of *Queen v. Sham Bagdi* 20 W. R. 73: 13 B. L. R. App. 19 still holds the ground, namely that this Court should not

interfere with a unanimous verdict of the Jury unless we can say decidedly that we think that it is clearly wrong. This, no doubt, is a survival of the well-established tradition of English Criminal Jurisprudence; but notwithstanding this, due weight must be given to the opinion of the Judge as required by the Statute.⁶⁶

In dealing with a case under S. 307 Cr. P. C., the High Court which has not got the opportunity to see the witnesses must act with great caution. In such a case the High Court is not justified in interfering with the verdict of the Jury merely because, in its opinion, the evidence would have warranted a different conclusion.⁶⁷

2. We note below the later decisions of the different Courts :—

A. Calcutta :—

In the case of a divided verdict, the High Court after considering the whole evidence may set aside the majority verdict which gave the accused the benefit of the doubt even though it is a question of fact.⁶⁸ The duty of the High Court on a Reference is to consider the evidence on the record as it stands; to weigh the respective opinions of the Sessions

66. *Dhananjay* (1923) 51 C. 347 : 38 C.L.J. 384 : 25 Cr. L.J. 758 : A.I.R. 1924 C. 321 : 81 I.C. 246.

67. *Akbar Molla* (1923) 51 C. 271 : 38 C.L.J. 379 : 25 Cr. L.J. 773 : A.I.R. 1924 C. 449 : 81 I.C. 547 [following *Reg. v. Bertrand* (1867) L.R. 1 P. C. 520 at P. 535 : 4 Moore P. C. (N.S.) 460 : 36 L.J.P.C. 51 : 16 L.T. 752 : 16 W. R. 9 (Eng.) : 10 Cox. C. C. 618 : 16 E. R. 391 and referring to *Sham Bagdi* (1873) 20 W. R. 73 : 13 B. L. R. App. 19 and *Nriya Gopal* (1922) 38 C. L. J. 1 : 24 Cr. L. J. 397 : 75 I.C. 145]. In *Reg. v. Bertrand*, noted above, Sir John Coleridge said, "The most careful note must often fail to convey the evidence fully in some of its most important elements;

those for which the open oral examination of the witness in presence of prisoner, Judge and Jury is so justly prized. It cannot give the look or manner of the witness : his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration ; it cannot give the manner of the prisoner, when that has been important, upon the statement of anything of particular moment ; * * it is, in short, or it may be, the dead body of the evidence, without its spirit, which is supplied, when given openly and orally, by the ear and eye of those who receive it."

68. *Bansi Sheikh* (1923) 51 C. 469 : 26 Cr. L. J. 24 : A. I. R. 1924 C. 718 : 83 I. C. 504.

Judge and the Jury and then to form its own conclusion; when this process has been carried out and the opinions of the Judge and the Jury have been measured, in the result the verdict of the Jury should stand unless the evidence and the opinion of the Judge show clearly that it is wrong and that in the interest of justice it should be reversed.⁶⁹ S. 307 Cr. P. C. does not require the High Court to reconstruct the verdict but only to give due effect to it as well as to the opinion of the Sessions Judge.⁷⁰ The real test is to see whether the verdict is so unreasonable that reasonable men could not have arrived at the verdict; so the High Court will not interfere unless it can be said that it was not possible for the Jury to have arrived at the verdict.⁷¹ Unless the verdict is perverse or unsustainable it will not be interfered with,⁷² but it is not necessary that it should be perverse.⁷³ Where a case rests entirely on oral evidence the Jury who saw the witnesses and heard them are the most competent to judge as to the value of such evidence, and effect should be given to their verdict in a Reference under S. 307 Cr. P. C.⁷⁴ It was said in another case⁷⁵ :—It may be that if I were to try the accused with the assistance of a Jury I should have felt inclined to agree with the view taken by the Judge; but as we have got to give due weight to the verdict of the Jury and also to the opinion of the Judge what we have to be satisfied about in order to be able to interfere is that the verdict of the Jury is wrong and the view taken by the Judge is right. Though great weight attaches to the opinion of the Jury on questions which are purely questions of fact, yet the High Court will not accept even a unanimous verdict of guilty if the whole case appears to be suspicious.⁷⁶ It is the duty of the High Court not only to consider the entire evidence but to give due weight to the verdict of the Jury and the opinion of the Judge, and where it appears that the Jury might come to the conclusion at which they arrived and their verdict could not be said to be perverse, the High Court ought not to interfere.⁷⁷ A Jury returned a verdict of not guilty, but one

69. Jamaldi Fakir (1923) 51 C. 160 : 28 C. W. N. 536 : 25 Cr. L. J. 1000 : A. I. R. 1924 C. 701 : 81 I. C. 712.

70. Sagarmal (1924) 28 C. W. N. 947 : 40 C. L. J. 135 : 25 Cr. L. J. 1217 : A. I. R. 1924 C. 960 : 82 I. C. 145.

71. Golam Kader (1924) 28 C. W. N. 876 : 25 Cr. L. J. 1284 : A. I. R. 1924 C. 956 : 82 I. C. 356 ; Har Mohan Das (1927) 54 C. 708 : 28 Cr. L. J. 903 : A. I. R. 1927 C. 848 : 105 I. C. 231 ; Premananda (1925) 52 C. 987 : 29 C. W. N. 738 : 42 C. L. J. 247 : 26 Cr. L. J. 1256 : A. I. R. 1925 C. 876 : 88 I. C. 1000 ; Khuday Gazi (1928) 48 C. L. J. 541 : 30 Cr. L. J. 125 : 113 I. C. 285.

72. Abinash (1924) 52 C. 172 : 28 C. W. N. 995 : 26 Cr. L. J. 350 : A. I. R. 1924 C. 1029 : 84 I. C. 654.

73. Jahur Sheikh (1926) 30 C. W. N. 912 : 45

C. L. J. 20 : 27 Cr. L. J. 1402 : A. I. R. 1926 C. 1107 : 98 I. C. 714.

74. Faratulla (1924) 40 C. L. J. 592 : 26 Cr. L. J. 677 : A. I. R. 1925 C. 394 : 86 I. C. 53.

75. Nishi Kanta (1924) 41 C. L. J. 35 : 26 Cr. L. J. 805 : A. I. R. 1925 C. 528 : 86 I. C. 453.

76. Yakub (1925) 30 C. W. N. 859 : 27 Cr. L. J. 1341 : A. I. R. 1926 C. 1034 : 98 I. C. 413 ; Mamat Ali (1926) 44 C. L. J. 233 : 28 Cr. L. J. 19 : 99 I. C. 51.

77. Mofizel Peada (1925) 29 C. W. N. 842 : 26 Cr. L. J. 1298 : A. I. R. 1925 C. 909 : 89 I. C. 242 ; Nagar Ali (1928) 56 C. 132 : 32 C. W. N. 952 : 30 Cr. L. J. 584 : A. I. R. 1929 C. 287 : 116 I. C. 171 ; Izazuddin (1928) 32 C. W. N. 894 : 30 Cr. L. J. 804 : 117 I. C. 602 ; Balai (1929) 50 C. L. J. 518 : 31 Cr. L. J. 667 : A. I. R. 1930 C. 141 : 124 I. C.

of the jurors was not competent to act as a juror as he had not been summoned ; the Judge made a reference under S. 307 disagreeing with the verdict : *Held*, that though the Court was not properly constituted and the verdict was a nullity, yet as the verdict was in accordance with the facts of the case as established by the evidence, the Court should not interfere.⁷⁸ It was not contemplated that the High Court should upset the verdict unless it is perverse, *i.e.*, the Jury deliberately refused to do their duty as jurors or that they failed to comprehend the evidence.⁷⁹ Interference with the verdict of a Jury except in the case of a frequent and patent miscarriage of justice is dangerous and liable to lead to the condemnation of innocent people.⁸⁰

But in one case the Calcutta High Court has said :—"The point of view from which references under S. 307 should be considered by the High Court has been the subject of numerous judicial decisions. They seem to vary from the extreme view that the High Court should be very reluctant to interfere with a verdict of a Jury to the view that the High Court in dealing with these references is to be guided by the plain words of the Code. Speaking for myself I have always thought that I am upon firmer ground if I adhere to the strict words of the Code and do not interpret the Code in the light of the practice in other countries, where law and conditions are different. Here the Code is explicit. The High Court shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and of the Jury, acquit or convict the accused. The Code would not seem to put the opinion of the Jury on any higher plane than the opinion of the Judge ; both should be given due weight. There is no suggestion that more weight should be given to the opinion of the Jury than to that of the Judge. Speaking for myself I should, as a general rule, be inclined to attach more weight to the opinion of the learned Sessions Judge. He, equally with the Jury, has heard the witnesses and has been able to observe their demeanour. He has been trained to weigh and appreciate evidence and further he must give reasons for his opinion. The Jury are a body of laymen unaccustomed to weigh or appreciate evidence, who give no reasons for their opinion. Obviously an opinion supported by reason is likely to carry more weight than an opinion entirely unsupported by reasons."⁸¹

B. Bombay :—

It is only when, as a matter of fact, the High Court is of opinion that the verdict of the Jury is perverse that it can, on a reference, place its own opinion against the opinion of the Jury.⁸²

486 ; Meajan (1929) 31 Cr. L. J. 698 : A. I. R. 1929 C. 737 : 124 I. C. 523.

78. Irjan (1927) 46 C. L. J. 241 : 28 Cr. L. J. 874 : A. I. R. 1927 C. 820 : 104 I. C. 714.

79. Bhondar (1931) 35 C. W. N. 1212 : 54 C. L. J. 499 : 33 Cr. L. J. 11 : A. I. R. 1931 C. 601 : 134 I. C. 1053 ; Nashai Sardar (1932) 56 C. L. J. 19 (S. B.) : 33 Cr. L. J. 593 : A. I. R. 1932 C. 656 : 138 I. C. 278.

80. Bishnu Chandra (1933) 37 C. W. N. 1180 (S. B.) : 34 Cr. L. J. 918 : A. I. R. 1933 C. 665 : 145 I. C. 236.

81. Ram Chandra (1927) 55 C. 879 : 29 Cr. L. J. 823 : A. I. R. 1928 C. 732 : 111 I. C. 327, *per* Cuming J.

82. Walker (1924) 26 Bom. L. R. 610 : 26 Cr. L. J. 211 : A. I. R. 1924 B. 450 : 83 I. C. 995.

In a case tried under Chapter XXXIII the Judge disagreed with the Jury, who unanimously found the accused not guilty, and made a reference under S. 307 Cr. P. C. The High Court observed : "In a case tried under this Chapter the finding of the Jury on a question of fact is no longer final ; and under the circumstances we think that the authorities which lay down that the High Court will not interfere in a case under S. 307 Cr. P. C., unless it is shown that the verdict of the Jury is wholly unreasonable or perverse lose much of their force and really pass very little appreciation. We consider that it is our duty in the present case to consider all the evidence in the case and to give judgment after considering it as well as the opinions of the Sessions Judge and the Jury."⁸³ But it has also been held that the High Court cannot interfere unless it is satisfied that the verdict of the Jury is perverse, that is to say, that no Jury on the evidence would have entertained any reasonable doubt as to the guilt of the accused ; it will not interfere with the verdict merely because on a perusal of the evidence the Judges think that they would have come to a different conclusion from that to which the Jury arrived.⁸⁴

C. Madras :—

In a case of reference the High Court, in examining the evidence for itself, has thrown upon it the burden of examining for itself the entire evidence, deriving such assistance as it can, by giving due weight to, without being bound by, the opinions of the Sessions Judge and the Jury ; the opinion of the Sessions Judge is that as expressed in the reference or at the hearing, and the opinion of the Jury is usually found expressed in the verdict ; in such a case as the above the High Court must make up its own mind, realising that it has a disadvantage in not having seen the witnesses, but has a more free hand than a Court of Appeal generally has.⁸⁵ This decision suggested that on a reference the case is reopened and no particular weight should be attached to the verdict of the Jury. The decision was, however, soon after over-ruled by a Full Bench and it was laid down that it is not within the province of the High Court to examine the evidence and decide for itself whether in its opinion the evidence justified the verdict arrived at, but it should examine the evidence to see whether upon that evidence the verdict is such as a reasonable men could give.⁸⁶ The High Court will not re-try the case as if there has been no trial ; but on the assumption that the Judge will not make a reference unless he thinks that the verdict is manifestly wrong, the High Court will confine itself to the question whether the Judge's opinion on the verdict, *i.e.*, whether it is perverse, unreasonable or altogether against the weight of evidence, is correct.⁸⁷

D. Allahabad :—

The High Court in dealing with a reference has full powers to refer all matters in connection with a verdict of acquittal by a Jury with which the Judge has disagreed and which

83. Bimal (1924) 26 Cr. L. J. 1241 : A. I. R. 1925 L. 401 : 88 I. C. 857.

84. Bai Lali (1932) 34 Bom. L. R. 896 : 33 Cr. L.J. 745 : 139 I. C. 272.

85. In re Nanni Kudumban (1923) 45 M. L. J. 406 : 25 Cr. L. J. 145 : A. I. R. 1924 M. 232 : 76 I. C. 289.

86. In re Veerappa (1928) 51 M. 956 (F. B.) : 30 Cr. L. J. 317 : A. I. R. 1928 M. 1186 : 114 I. C. 353.

87. Venkatachala (1931) 1931 M. W. N. 1053 : 33 Cr. L. J. 215 : A. I. R. 1932 M. 21 : 136 I. C. 33.

he has referred ; but the High Court will not interfere with the verdict unless it is perverse and clearly and manifestly wrong ; the advantage of adopting this course is that it secures the object of the Legislature in creating juries and any undue interference with the verdict of a Jury tends to diminish the sense of responsibility which it is desirable the Jury should cherish.⁸⁸ The verdict should be interfered with when it is perverse or patently wrong.⁸⁹ Though the High Court has a wide discretion it should always give some weight to the finding of the Jury, and if the Jury's verdict is not unreasonable but is merely dissented from by the Judge on the ground that the Jury did not believe the evidence which the Judge believed the High Court should not interfere.⁹⁰ The High Court has undoubted jurisdiction to disregard the verdict of the Jury and to convict the accused, if it is of opinion that the verdict of the Jury was perverse.⁹¹

E. Patna :—

It is not sufficient to show that another Jury might have formed a different opinion ; it must be shown that no reasonable body of men would have returned the verdict complained of.⁹² The High Court will not interfere unless it be for special reasons and under special circumstances ;⁹³ or unless it is of opinion that the verdict cannot be supported by any evidence on the record.⁹⁴ The High Court has power to consider the entire evidence and is not bound to accept the verdict even in so far as it has been accepted by the Judge.⁹⁵ The verdict of a Jury has more weight than the opinion of the assessors and should not be set aside unless no sensible man could have arrived at that verdict, particularly in the case of a verdict of acquittal.⁹⁶ The verdict should be set aside only when it is manifestly wrong and not in every case where there is a doubt whether it was right or whether a different view from that of the Jury can be entertained.⁹⁷ In a case depending entirely on oral evidence the verdict of the Jury ought not to be lightly disturbed, for they saw and heard the witnesses and were the most competent persons to judge as to the value of what they saw and heard.⁹⁸ In such a case, unless the verdict is perverse the High Court will not interfere.⁹⁹

88. Panna Lal (1924) 46 A. 265 : 25 Cr. L. J. 981 : A. I. R. 1924 A. 411 : 81 I. C. 629.

89. Jukhan (1929) 1929 A. L. J. 509 : 30 Cr. L. J. 1078 : A. I. R. 1929 A. 338 : 119 I. C. 443.

90. Madan Gopal (1931) 1931 A. L. J. 695 : 32 Cr. L. J. 1028 : 133 I. C. 475.

91. Sri Kishan (1935) 1935 A. L. J. 1019 : 37 Cr. L. J. 135 : A. I. R. 1935 A. 970 : 159 I. C. 621.

92. Zahir Haider (1925) 27 Cr. L. J. 1041 : A. I. R. 1926 P. 566 : 97 I. C. 17 ; Ali Hyder (1923) 26 Cr. L. J. 856 : A. I. R. 1923 P. 474 : 86 I. C. 712.

93. Bajit Mian (1927) 6 P. 817 : 29 Cr. L. J. 81 : A. I. R. 1928 P. 120 : 106 I. C. 673.

94. Gobind Singh (1926) 5 P. 573 : 27 Cr. L. J. 1308 : A. I. R. 1926 P. 535 : 98 I. C. 252.

95. Wazira Mahto (1927) 30 Cr. L. J. 390 : A. I. R. 1928 P. 596 : 115 I. C. 229.

96. Vidyasagar Pande (1928) 8 P. 74 : 29 Cr. L. J. 1035 : A. I. R. 1928 P. 497 : 112 I. C. 363.

97. Ramdas (1928) 8 P. 344 : 30 Cr. L. J. 721 : A. I. R. 1929 P. 313 : 117 I. C. 173 ; Rafi Mian (1932) 11 P. 669 : 33 Cr. L. J. 877 : A. I. R. 1932 P. 246 : 139 I. C. 885 ; Suar Gola (1934) 36 Cr. L. J. 262 : A. I. R. 1934 P. 533 : 152 I. C. 1021.

98. Kameshwar (1933) 34 Cr. L. J. 828 : A. I. R. 1933 P. 481 : 144 I. C. 872.

99. Sitalu (1933) 14 P. L. T. 217 : 34 Cr. L. J. 731 : A. I. R. 1933 P. 273 : 144 I. C. 246 ; Bhagwat (1935) 16 P. L. T. 603 : 36 Cr. L. J. 1502 : A. I. R. 1935 P. 433 : 158 I. C. 1131.

F. Lucknow :—

The language of the Court does not justify any undue preference being given to the opinion of the Jury over that of the Judge ; the Court has to weigh both the opinions and consider the entire evidence just as it would consider any other matter coming before it for decision.¹⁰⁰ A different view has been taken in subsequent cases. It has been held that the question to be decided was whether the verdict of the Jury was manifestly wrong or perverse and the High Court has not to decide on what would appear to it as true or false but to consider whether the view taken by the Jury was such as could not be supported on any consideration of the evidence whatsoever.¹⁰¹ So also, it was held that the High Court will not convert an acquittal into a conviction where the verdict cannot be held to be perverse or unreasonable ;¹⁰² or as patently bad and perverse ;¹⁰³ or where the Jury's view was bad or impossible ;¹⁰⁴ or unless the verdict can be termed as a perverse verdict ;¹⁰⁵ or unless the verdict is one contrary to the evidence or at least totally unjustified by the evidence.¹⁰⁶

G. Nagpur :—

The High Court will interfere with the verdict only when it is obviously perverse or manifestly wrong and unreasonable.¹⁰⁷

3. 'The Judge'.—

In the Code of 1872, the expression was 'Sessions Judge'. The word 'Sessions' was omitted when by Act III of 1884, S. 8, a new Section 451A was added by which S. 307 was made applicable to Jury trials before the District Magistrate in the case of European British subjects.¹⁰⁸ The Act has now been repealed by Act XII of 1923, but the word "Sessions" was not re-introduced.

A case can be submitted under S. 307 only by the Sessions Judge who has held the

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| <p>100. Ram Charan (1923) 11 O. L. J. 210 : 25 Cr. L. J. 785 : A. I. R. 1924 O. 314 : 81 I. C. 305.</p> <p>101. Mohammad Shafi (1925) 26 Cr. L. J. 1576 : A. I. R. 1926 O. 57 : 90 I. C. 536.</p> <p>102. Shaikat Husain (1927) 28 Cr. L. J. 895 : A. I. R. 1927 O. 607 : 104 I. C. 911.</p> <p>103. Maharaj (1928) 3 Luck. 456 : 29 Cr. L. J. 452 : A. I. R. 1929 Q 86 : 108 I. C. 900 ; Ram Dass (1932) 9 O. W. N. 301 : 33 Cr. L. J. 465 : 137 I. C. 346 ; Asghar (1933) 10 O. W. N. 883 : 35 Cr. L. J. 33 : 146 I. C. 303.</p> <p>104. Chiraunji Lal (1930) 5 Luck. 720 : 7 O. W. N. 376 : 31 Cr. L. J. 719 : A. I. R. 1930 O. 334 : 124 I. C. 661 ; Chupai (1933) 10 O. W. N. 971 : 35 Cr. L. J. 285 : 147 I. C. 53.</p> | <p>105. Chheda (1933) 8 Luck. 439 : 34 Cr. L. J. 795 : A. I. R. 1933 O. 181 : 144 I. C. 582 ; Abdul Rahim (1934) 11 O. W. N. 905 : 35 Cr. L. J. 1130 : A. I. R. 1934 O. 399 : 150 I. C. 845.</p> <p>106. Bhagwan Din (1928) 6 O. W. N. 40 : 30 Cr. L. J. 570 : A. I. R. 1929 O. 280 : 116 I. C. 207.</p> <p>107. Kankaya (1926) 22 N. L. R. 42 : 27 Cr. L. J. 773 : A. I. R. 1926 N. 308 : 95 I. C. 309 ; Mohammad Hadi (1928) 3 Luck. 494 : 29 Cr. L. J. 983 : A. I. R. 1928 O. 277 : 112 I. C. 103 ; Ramdayal (1928) 30 Cr. L. J. 789 : A. I. R. 1929 N. 113 : 117 I. C. 277.</p> <p>108. See Mc Carthy (1887) 9 A. 420 : 7 A. W. N. 39.</p> |
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trial. He is competent to act for this purpose even after he has vacated office, and reverted to the post of a Magistrate.¹⁰⁹

A Judge of the Sind Judicial Commissioner's Court has no power to make a reference when he tries a Sessions Case.¹¹⁰

4. Disagrees with the verdict of the Jury.—

Formerly, the disagreement was to be such a complete dissent as to lead the Judge to consider it necessary, for the ends of justice, to submit the case to the High Court.¹¹¹ This was whittled down, and now it is sufficient for a reference, if the Judge disagrees and is clearly of opinion that the reference should be made for the ends of justice. The Patna High Court has, however, recently held that the Sessions Judge should not refer a case to the High Court unless his dissent from the opinion of the Jury is such a complete dissent as to lead the Judge to consider it necessary, for the ends of justice, to submit the case to the High Court, and where such complete dissent is not recorded the verdict of the Jury must stand.¹¹² A disagreement within the meaning of S. 307 is one of the conditions precedent to a reference; it is doubtful whether a Judge is justified in referring the case to the High Court where his quarrel with the Jury's verdict is not that the persons who were found guilty should in fact have been found not guilty but that logically the persons who have been found not guilty should have been found guilty as well.¹¹³ The expression "Not agreeing with but accepting the verdict," which is often used by Judges when accepting the verdict of the Jury with which they do not agree, has been characterized as a deplorable mode of expression.¹¹⁴ See Notes under Heading *History of the Section, ante*.

As regards the meaning of the word 'verdict', see notes under that heading in Chapter VIII of Part II, *ante*.

See also notes under the heading "*Verdict when not to prevail*" in that Chapter.

5. Cases of offences triable partly by Jury and partly by Assessors.—

If the same body are to sit as jurymen and assessors, no reference can be based by the Sessions Judge upon the answers of the persons who were in fact the Jury but gave the answers in their capacity as Assessors.¹¹⁵ Four persons were tried by the Sessions Court on charges under Ss. 395, 396 and 302 I.P.C. The Jury returned a verdict of guilty against Nos. 1 & 4 and of not guilty against Nos. 2 & 3. The Judge overlooked the provisions of S. 269 Cr. P. C. Cl. 2., under which the first head of charge being triable by Jury the other heads should also be so tried, and he treated the Jury as assessors in respect of the second and third counts. He differed from the Jury in respect of those counts as regards Nos. 1 & 4, and concurred

109. Dil Mohamed (1904) 2 C. L. J. 48 : 2 Cr. L. J. 386.

L. J. 965 : A. I. R. 1933 C. 472 : 145 I. C. 365.

110. Jiand (1928) 22 S. L. R. 349 (F. B.) : 29 Cr. L. J. 945 : A. I. R. 1928 S. 149 : 111 I. C. 865.

114. Ebrahim Molla (1928) 56 C. 473 : 33 C. W. N. 371 : 30 Cr. L. J. 1036 : A. I. R. 1929 C. 415 : 119 I. C. 290.

111. Bhawani (1878) 2 B. 525 and the Code of 1882.

112. Rafi Mian (1932) 11 P. 669 : 33 Cr. L. J. 877 : A. I. R. 1932 P. 246 : 139 I. C. 885.

115. *In re Pachaimuthu* (1932) 55 M. 715 : 33 Cr. L. J. 533 : A. I. R. 1932 M. 512 : 137 I. C. 810.

113. Makhani Lal (1933) 37 C. W. N. 591 : 34 Cr.

with them in respect of Nos. 2 & 3. Being of opinion that the four prisoners were guilty of dacoity and not guilty of the other offences he referred the case to the High Court under S. 307 Cr. P. C. The High Court said: "In our judgment the unanimous opinion of the Jury on the second and third heads of charge must be treated as a formal verdict; the law made them the proper judges of the evidence and the facts, and the irregularity on the part of the Court could not deprive them of that power, or their opinion of its proper legal effect."¹¹⁶ Charges triable by Jury should be separated from those triable by assessors, and a reference can be made only in respect of the former charges.¹¹⁷

A Sessions Judge tried by Jury an accused on two charges, one of which was triable and the other was not triable by Jury, and dissenting from the verdict of the Jury referred the whole case to the High Court. *Held*: that he should have first recorded the opinion of the Jury as assessors regarding the charge not triable by Jury, and that the High Court could treat the verdict on the latter charge as valid.¹¹⁸ Where the accused were charged with distinct offences, some of which were triable by Jury and some with the aid of assessors and the case having been tried as a Jury and Assessor case, the Jury as such returned an unanimous verdict of 'not guilty' and as Assessors expressed the opinion that the accused were 'not guilty of any offence' and thereupon the Assistant Sessions Judge, disagreeing with the Jury, referred the whole case to the High Court: *Held*, that the reference should be rejected as being premature. The proper procedure for the Assistant Sessions Judge was to dispose of the charges which were triable with the aid of assessors, by recording a finding of acquittal or conviction and then to consider whether the interests of justice required that he should make a reference under S. 307 on the other charges.¹¹⁹ When the accused was tried by a Jury on a charge which was triable with the aid of assessors, it was held that the accused was validly tried, and the trial was complete when the Jury had returned their verdict; and that the Judge was bound under the circumstances, either to give judgment in accordance with the verdict, or, if he disagreed with it, to submit the case for the orders of the High Court, as provided by Ss. 306 and 307.¹²⁰ (See notes under S. 269 (3) in Ch. I). Even where the Judge discovers the mistake he may treat the trial as legal and refer the case to the High Court under S. 307, should he disagree with the verdict.¹²¹

6. "All or any of the charges.....has been tried".—

See Notes under the heading "*History of the Section*," *ante*. Where the prosecution on the graver charges has failed, not because the evidence as to what happened is false but because the facts alleged do not amount to the graver offences, the Sessions Judge, who has

116. Lakshmana (1885) 9 M. 42.

117. Kalidas (1898) 8 Bom. L. R. 599; 4 Cr. L. J. 192; Vyankatsing (1907) 9 Bom. L. R. 1057; 7 Cr. L. J. 236.

118. Devu (1892) Rat 600.

119. *In re Pachaimuthu* (1932) 55 M. 715; 33 Cr. L. J. 533; A. I. R. 1932 M. 512; 137 I. C. 810; Chanbasappa (1931) 33 Bom. L. R. 1571; 33 Cr. L. J. 172; A. I. R. 1932 B. 61;

135 I. C. 495; Lachman (1934) 15 P. L. T. 367; 36 Cr. L. J. 469; A. I. R. 1934 P. 424; 154 I. C. 16.

120. Surja Kurmi (1898) 25 C. 555 [following *In re Bhootnath Dey* (1879) 4 C. L. R. 405]; Jeyram (1899) 23 B. 696; 1 Bom. L. R. 114.

121. Bhagwat (1935) 16 P. L. T. 603; 36 Cr. L. J. 1502; A. I. R. 1935 P. 433; 158 I. C. 1131.

accepted the Jury's verdict so far as the graver charges are concerned, may nevertheless make a reference where he thinks that there should be a conviction on the minor charges.¹²²

7. Any accused person.—

The word 'any' was substituted for the word 'the' by Act XVIII of 1923, S. 81. See notes under heading "*History of the Section,*" *ante*.

Sub S. (2) does not mean that when the Judge is not prepared to accept the verdict of the Jury in its entirety, the whole case is to be referred to the High Court. It only contemplates reference in the case of those persons in respect of whom the Judge declines to accept the verdict. When the Judge agrees with the verdict in respect of any particular accused, he ought to convict and sentence or acquit that accused as the case may be.¹²³ If the case as against all the accused, including the case of the accused in respect of whom there is no difference between the Judge and the Jury be referred, the High Court will pass orders in accordance with the Jury's verdict, and consider the reference only in respect of those accused in respect of whom they differ.¹²⁴

8. When the Judge should refer.—

In an early case, on the trial by a Jury on a charge of murder, the Jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under S. 263 Cr. P.C. He recorded his separate orders, one discharging the accused of murder and the other convicting him of culpable homicide. The Local Government thereupon directed the Legal Remembrancer to appeal under S. 272 of the Code against the order acquitting the prisoner of the offence of murder and in pursuance of this direction an appeal was filed. *Held*, that the appeal lay, as the order of the Sessions Judge following the verdict of the Jury acquitting the prisoner is a judgment of acquittal within the meaning of S. 272. Jackson, J., said,—"I confess that I should have greatly desired that the Sessions Judge who tried the case in the Court below had thought right to set out in the proceeding the grounds upon which he abstained from doing that which the law enjoins him to do under S. 263 and not imposed upon the Judges of this Court the painful duty of passing the proper sentence in the case."¹²⁵

The direction of making a reference should always be exercised when the Judge thinks that the verdict is not supported by the evidence, because it is the only way in which miscarriage of justice by the perverse verdict of a Jury can be remedied by the High Court.¹²⁶

122. Hari Das (1922) 37 C. L. J. 34 : 24 Cr. L. J. 674 : A. I. R. 1923 C. 108 : 73 I. C. 770. See also Harilal (1928) 30 Cr. L. J. 793 : A. I. R. 1929 N. 114 : 117 I. C. 284.
123. Babar Ali (1914) 42 C. 789 : 19 C. W. N.

584 : 21 C. L. J. 492 : 16 Cr. L. J. 321 : 28 I. C. 657.

124. Devu (1892) Rat. 600.

125. Judoonath (1877) 2 C. 273.

126. Guruvadu (1890) 13 M. 343 : 2 Weir 339.

The Judge is bound to refer if he disagrees with the verdict of the Jury and is clearly of opinion that reference is necessary for the ends of justice.¹²⁷ Reference is not justifiable when on the Jury's charge, the prosecution evidence is so open to hostile criticism as to warrant suspicion.¹²⁸ But it is not improper merely because there was a weak link in it which he asked the Jury to consider, and advised them to pause before returning their verdict ;¹²⁹ or it is arguable, on the face of the charge, that the verdict was not altogether unreasonable.¹³⁰ But it is not in every case of doubt, nor in every case in which a view different from that of the Jury can be entertained on the evidence, that a reference under S. 307 is to be made to the High Court ; the verdict of the Jury should be manifestly wrong before such a reference is made.¹³¹ It may not be correct to say that the reference should be made only when the verdict of the Jury is manifestly wrong ; where the Sessions Judge forms the view that the prisoner had not committed any offence but the Jury found him guilty, the Judge has no option but to refer the case. In a trial by a Jury the position of a Judge in India differs from that of a Judge in an English Court who is merely an instrument for passing a sentence or directing a release, once a verdict is given. In India under the mandatory provisions of Ss. 306 and 307 Cr. P. C., the Judge must make up his mind whether he agrees or disagrees with the verdict and in the latter case form an opinion on the necessity, for the ends of justice, of submitting the case to the High Court.¹³²

In a certain case, the Jury found the accused guilty by a majority of 3 to 1, and the Sessions Judge, though not agreeing with the verdict, accepted it inasmuch as he was unable to say that it was perverse : *Held*, that it is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse, it is sufficient that he should be clearly of opinion that a reference is necessary for the ends of justice ; that the Judge's view of the evidence was the better view and that it would have been well if he had made a reference.¹³³ But the Madras High Court has recently held that a reference should be made by the Sessions Judge only in cases where in his view the verdict of the Jury is perverse or unreasonable or altogether against the weight of evidence.¹³⁴

Even though the Judge has expressed the opinion that he does not agree with the

127. Surja Kurmi (1898) 25 C. 555.

128. Chidghan (1902) 7 C. W. N. 135.

129. Abdul Rahaman (1908) 9 C. L. J. 432 : 10 Cr. L. J. 57 : 2 I. C. 593 [distinguishing Chidghan (1902) 7 C. W. N. 135].

130. Annada (1909) 36 C. 629 : 13 C. W. N. 757 : 9 C. L. J. 638 : 10 Cr. L. J. 32 : 2 I. C. 497 [following Abdul Rahaman (1908) 9 C. L. J. 432 : 10 Cr. L. J. 57 : 2 I. C. 593 ; referring to Chidghan (1902) 7 C. W. N. 135 and dissenting from Chirkua (1905) 2 A. L. J. 475 : 2 Cr. L. J. 357].

131. Surnamoyee (1913) 41 C. 621 : 14 Cr. L. J. 660 : 21 I. C. 930 ; Walker (1924) 26 Bom.

L. R. 610 : 26 Cr. L. J. 211 : A. I. R. 1924 B. 450 : 83 I. C. 995 ; Meajan (1929) 31 Cr. L. J. 698 : A. I. R. 1929 C. 737 : 124 I. C. 523.

132. Barwick (1932) 13 L. 573 : 33 Cr. L. J. 220 : A. I. R. 1932 L. 345 : 136 I. C. 5.

133. Ismail (1918) 23 C. W. N. 747 : 19 Cr. L. J. 830 : 46 I. C. 846 ; Jahur Sheikh (1926) 30 C. W. N. 912 : 45 C. L. J. 20 : 27 Cr. L. J. 1402 : A. I. R. 1926 C. 1107 : 98 I. C. 714 ; Saroda (1925) 41 C. L. J. 320 : 26 Cr. L. J. 1006 : A. I. R. 1925 C. 795 : 87 I. C. 606.

134. Venkatachala (1931) 1931 M. W. N. 1053 : 33 Cr. L. J. 215 : A. I. R. 1932 M. 21 : 136 I. C. 33.

unanimous verdict of the Jury, still the Judge is not bound to refer the case to the High Court under S. 307. He has a discretion in the matter and may accept the verdict though he did not agree with it and may pass sentence on the accused.¹³⁵ The Section gives a discretion to the Judge in the matter of reference and it is only when he disagrees with the verdict of the Jury and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he can so submit it. Failure to submit the case is not a ground for interference by the Court on appeal.¹³⁶

S. 306 Cr. P. C. does not require that the Judge should agree with the verdict of the Jury before accepting it, but only that he should not think it necessary to express disagreement. If he does think it necessary to express disagreement, then his only course is to refer the case to the High Court under S. 307, but the High Court, in a reference under S. 307, will not interfere with the verdict of the Jury unless such verdict is perverse. It may, therefore, not infrequently happen that a Judge trying a case with a Jury considers that the appreciation of evidence by the Jury is incorrect, and that their verdict is wrong, but at the same time it is not so perverse a verdict as to justify a reference to the High Court. In this case there were two charges against the accused, one under S. 302 I. P. C., triable by Jury and the other under S. 201 I. P. C., triable with the aid of assessors. The Judge accepted the verdict of not guilty of the Jury and acquittal on the charge under S. 302, although he considered the verdict wrong; but he disagreed with the opinion of the jurors as assessors on the charge under S. 201 and convicted the accused. *Held*, that the Judge was right in acting upon his own view of evidence and was not bound to make a reference to the High Court.¹³⁷

It is open to the Sessions Judge to disagree with the Jury; it is incumbent upon him to do so, if he is clearly of opinion that such a course is necessary for the ends of justice; but this does not require that he should make reflections upon the conduct of the jurors, which are not supported by evidence on the record. Such reflections are unfair to the jurors to the Sessions Judge and to the High Court.¹³⁸ If his dissent is not so complete as to lead him to consider it necessary for the ends of justice to refer the case, his refusal to do so is right; but if his dissent is clear, full and complete, and the ends of justice demand a reference, it is obligatory and not discretionary to refer the case.¹³⁹ Section 307 Cr. P. C. places a powerful weapon in the hands of the Judge in the Mofussil, and it is not available to a Judge of the High Court sitting in Sessions, to prevent miscarriage of justice on account of a wrong verdict on the part of a Jury, and on a view of its provision it is necessary that the trial Judge should for himself appreciate the evidence and form his own opinion on the case so as to see whether it is necessary for the ends of justice to make a reference against the

135. Eran Khan (1923) 50 C. 658 : 24 Cr. L. J. 838 : A. I. R. 1924 C. 47 : 74 I. C. 950.

136. Bajit Mian (1927) 6 P. 817 : 29 Cr. L. J. 81 : A. I. R. 1928 P. 120 : 106 I. C. 673 ; Ramdas (1928) 8 P. 344 : 30 Cr. L. J. 721 : A. I. R. 1929 P. 313 : 117 I. C. 173.

137. Mhasku Malu (1934) 37 Bom. L. R. 109 : 37

Cr. L. J. 26 : A. I. R. 1935 B. 165 : 158 I. C. 1090.

138. Mamfru (1923) 51 C. 418 : 38 C. L. J. 397 : 25 Cr. L. J. 776 : A. I. R. 1924 C. 323 : 81 I. C. 264.

139. Saroda (1925) 41 C. L. J. 320 : 26 Cr. L. J. 1006 : A. I. R. 1925 C. 795 : 87 I. C. 606.

verdict.¹⁴⁰ But it has been held that the High Court has no power to direct the Sessions Judge to make a reference under S. 307 Cr. P. C.¹⁴¹ If he does not believe that the verdict is right, it is his duty to refer the case to the High Court.¹⁴² Where the evidence against the two accused is the same, but the Jury found one guilty and the other not guilty, the verdict is manifestly perverse, and the Judge is bound to refer the case to the High Court.¹⁴³ But the fact that upon the same evidence the Court convicted certain other persons who were tried in another case can be no justification for submitting the case under S. 307 Cr. P. C., unless the Judge himself considered the evidence against the present accused reliable, independently of the result of the other trial.¹⁴⁴ Reference is not obligatory when the Judge does not think it necessary in the interests of justice.¹⁴⁵ Where the Sessions Judge recorded that he saw no reason for not accepting the verdict of the Jury and adjourned the trial to pass sentence, he was not competent to reconsider the case and to refuse to accept the verdict and refer the case to the High Court; in such a case the High Court refused to consider the reference and directed the Sessions Judge to pass sentence.¹⁴⁶ It is not competent to a Sessions Judge to examine witnesses in a Jury trial after the Jury has gone and in the absence of the accused and then to act on the evidence in determining whether or not he should differ from the Jury and refer the matter to the High Court.¹⁴⁷ Necessity for reference to the High Court for ends of justice in the opinion of the Sessions Judge, is one of the two conditions for the application of the Section; mere disagreement between the Judge and Jury is not enough,¹⁴⁸ The words "necessary for the ends of justice, etc.," mean something more than mere complete disagreement; and the necessity of submitting a case must depend on the gravity of the offence and its prevalence, and considerations of a similar nature.¹⁴⁹ Where the Judge agrees with the view that no offence was committed under S. 459 I. P. C., but is of opinion that the accused is guilty of the minor offence under S. 325, though the Jury returned a verdict of not guilty, the Cr. P. Code provides no other course than submittal of the case to the High Court.¹⁵⁰ A reference is not incompetent if it is on a minor charge on which the Judge is in disagreement with the Jury, though on the major charge there has been agreement.¹⁵¹

Where the verdict of the Jury did not proceed upon a consideration of the evidence for the prosecution which was all one way and absolutely free from any taint, the verdict is

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| 140. <i>Ilu</i> (1934) 62 C. 337 : 36 Cr. L.J. 358 : A. I. R. 1934 C. 847 : 153 I. C. 454. | 147. <i>Ningappa</i> (1905) 7 Bom. L. R. 979 : 3 Cr. L. J. 42. |
| 141. <i>Chit Maung</i> (1910) 3 Bur. L. T. 75 : 11 Cr. L. J. 657 : 8 I. C. 455. | 148. <i>Bepin</i> (1928) 32 C. W. N. 673 : 47 C. L. J. 483 : 29 Cr. L. J. 819 : A. I. R. 1928 C. 444 : 111 I. C. 323. |
| 142. <i>Arajali</i> (1926) 30 C. W. N. 376 : 27 Cr. L. J. 1254 : 98 I. C. 102. | 149. <i>Panchanon</i> (1932) 37 C. W. N. 341 : 34 Cr. L. J. 608 : A. I. R. 1933 C. 404 : 143 I. C. 600. |
| 143. <i>In re Vollayan</i> (1925) 23 L. W. 90 : 27 Cr. L. J. 176 : A. I. R. 1926 M. 370 : 91 I. C. 960. | 150. <i>Harilal</i> (1928) 30 Cr. L. J. 793 : A. I. R. 1929 N. 114 : 117 I. C. 284. <i>See also Hari Das</i> (1922) 37 C. L. J. 34 : 24 Cr. L. J. 674 : A. I. R. 1923 C. 108 : 73 I. C. 770. |
| 144. <i>Irya Doddappa</i> (1904) 6 Bom. L. R. 599 : 1 Cr. L. J. 743. | 151. <i>Harilal</i> (1928) 30 Cr. L. J. 793 : A. I. R. 1929 N. 114 : 117 I. C. 284. |
| 145. <i>Hari Charan</i> (1925) 27 Cr. L. J. 398 : A. I. R. 1926 C. 728 : 93 I. C. 46. | |
| 146. <i>Mojahur</i> (1900) 4 C. W. N. 683, | |

clearly perverse, and the Judge can refer the case.¹⁵² In a joint trial the evidence against all was to the same effect, and the Judge summed up for the acquittal of all, but the verdict of the Jury was not guilty with regard to one and guilty with regard to the rest; and the Judge agreed with the Jury with respect to the former; in such a case the procedure to be followed by the Judge is that he should refer the verdict of the Jury in respect of the other accused as flagrantly perverse.¹⁵³ But where the charge to the Jury indicated that there were materials for conviction under S. 366 I. P. C., or under S. 363 I. P. C., and left it to the Jury themselves to determine whether the conviction should be one under S. 366 or S. 363, a verdict under S. 363 cannot be held to be perverse.¹⁵⁴

An unreasonable verdict is one which is contrary to evidence or at least totally unjustified by the evidence.¹⁵⁵ Where the verdict is a verdict which would not have been come to by a reasonable man, then alone a reference under S. 307 is competent and not in every case where the Judge disagrees.¹⁵⁶ When the Jury, inspite of the warning by the Judge on account of the grave defects in the prosecution case, returned an unanimous verdict of guilty, a reference under the Section is justified.¹⁵⁷

9. Recording the grounds of his opinion, &c. —

In submitting the case to the High Court, the Sessions Judge shall record the grounds of his opinion that it is necessary for the ends of justice, and, when the verdict is one of acquittal, state the offence which he considers to have been committed (S. 307). He should, in his letter of reference, set forth the particular facts disclosed by the evidence and the portions of evidence, on which he relies for conviction; he should not merely state that the verdict is erroneous and refer to the charge for the facts.¹⁵⁸ An order for reference under S. 307 must be in the nature of a judgment, giving a proper summary of the evidence and the reasons for the opinion of the Judge making the reference. The words "recording the grounds of his opinion" in S. 307 mean that the Judge making a reference to the High Court should, in effect, show the reasons for his opinion in as clear a manner as he would have done if the case had not been a Jury case and he had had to write a judgment. In making a reference the Judge takes upon himself the responsibility of requiring the Court to "consider the entire evidence" [as stated in S. 307 (3) Cr. P. C.]: and if he fails to write what is in effect a judgment, there is a risk that he may too lightly put the High Court to the trouble of considering the entire evidence.¹⁵⁹ A letter of reference should ordinarily state the case and the verdict of the

152. Jukhan (1929) 1929 A. L. J. 509 : 30 Cr. L. J. 1078 : A. I. R. 1929 A. 338 : 119 I. C. 443.

153. In re Vollayan (1925) 23 L.W. 90 : 27 Cr. L.J. 176 : A. I. R. 1926 M. 370 : 91 I. C. 960.

154. Ali Raja (1924) 28 O. C. 69 : 26 Cr. L. J. 310 : A. I. R. 1925 O. 311 : 84 I. C. 454.

155. Bhagwan Din (1928) 6 O. W. N. 40 : 30 Cr. L.J. 570 : A.I.R. 1929 O. 280 : 116 I.C. 207.

156. Lal Mohammad (1929) 11 P. L. T. 452 : 30 Cr. L. J. 1114 : A. I. R. 1930 P. 174 : 119 I. C. 898.

157. Komoruddin (1924) A. I. R. 1928 C. 233.

158. Bhut Nath (1902) 7 C. W. N. 345 ; In re Sakhichand (1927) 9 P. L. T. 649 : 30 Cr. L. J. 210 : A. I. R. 1929 P. 16 : 113 I. C. 694 ; Dyamanaik (1904) 6 Bom. L. R. 518 : 1 Cr. L. J. 586 ; Irya (1904) 6 Bom. L. R. 599 : 1 Cr. L. J. 743 ; Chandra Krishna (1908) 10 Bom. L. R. 173 : 7 Cr. L. J. 192.

159. Sheo Din (1927) 50 A. 540 : 29 Cr. L. J. 312 : A. I. R. 1928 A. 622 : 108 I. C. 159.

Jury and concisely the ground upon which the Judge differs from that verdict ; where the Judge made a reference on the ground that he could not agree with the verdict as their appreciation of the evidence was not proper and that on the evidence the accused should have been given the benefit of the doubt ; *held*, that the reference did not satisfy the requirements of the law.¹⁶⁰

Where the Judge merely stated that the verdict was erroneous and inconsistent, the High Court held that the reference was not a proper one and sent back the record to the Sessions Judge to submit a proper reference stating the grounds of his opinion and the offences which he considers to have been committed.¹⁶¹ The High Court cannot deal with a reference made without compliance with Sub-sections (1) and (2) ; that is to say, where the Judge did not clearly say that it was necessary for the ends of justice to submit the case to the High Court and also where he did not say that he disagreed with the verdict of the Jury.¹⁶² The reference must be limited to the evidence admitted and placed before the Jury ; police proceedings and diaries not admissible and not, therefore, before them, should not be referred to. Special pleading, on behalf of the Police, is improper.¹⁶³ Under S. 307, a duty is imposed upon the High Court to consider the entire evidence and to acquit or convict the accused after giving due weight to the opinions of the Sessions Judge and the Jury ; such opinion of the Sessions Judge must be on the merits of the case as based on the materials placed before him at the trial and does not include his speculations as to what might or might not have influenced the jurors.¹⁶⁴ It is the duty of the Judge, when he disagrees with a verdict of acquittal, to state the offence which, in his opinion, has been committed.¹⁶⁵ It is very desirable, when a Jury brings in a verdict of 'not guilty' and the Judge disagrees with it, that the Judge should ask for specific findings on the particular facts on which he himself relies ; the High Court could then understand the particular grounds on which the Jury proceeded, and it would only be necessary to consider the propriety of those grounds. A bare verdict of 'not guilty' may be consistent with a belief of a great part of the evidence for the prosecution, as with a total disbelief of every part of it.¹⁶⁶ The Sessions Judge should give reasons for his opinion in sufficient detail to enable the High Court to appreciate it and give due weight to it. When on his own showing, in his charge to the Jury, the evidence is so open to hostile criticism as to justify the Jury in regarding it with suspicion, the Sessions Judge does not exercise a proper discretion in referring the case under S. 307.¹⁶⁷ But the reference is competent when the Judge states that the only witness upon whom the prosecution must rely in order to succeed is not a witness to be relied upon ; the case is different from a case

160. Jogi Kar (1929) 57 C. 1183 : 32 Cr. L. J. 452 : A. I. R. 1931 C. 15 : 129 I. C. 798.

161. Taribullah (1921) 25 C. W. N. 682 : 23 Cr. L. J. 244 : 66 I. C. 180.

162. Rajeshwar (1905) 9 C. W. N. lxvi.

163. Jadub Das (1899) 27 C. 295, 303, 304 : 4 C. W. N. 129.

164. Mamfru (1923) 51 C. 418 : 38 C. L. J. 397 : 25 Cr. L. J. 776 : A. I. R. 1924 C. 323 : 81

I. C. 264. See also Dhananjay (1923) 51 C. 347 : 38 C. L. J. 384 : 25 Cr. L. J. 758 : A. I. R. 1924 C. 321 : 81 I. C. 246.

165. Sahae Rae (1878) 3 C. 623 : 2 C. L. R. 304 ; Panchanon (1932) 37 C. W. N. 341 : 34 Cr. L. J. 608 : A. I. R. 1933 C. 404 : 143 I. C. 600.

166. In re Pamanna (1884) 2 Weir 388.

167. Chidghan (1902) 7 C. W. N. 135.

where the Judge merely takes a view of the evidence, as a whole, different from the view of the Jury.¹⁶⁸

10. Reference, not in proper form, may be returned.—

There are instances in which references have been returned for re-submission if necessary, in cases in which the Judge did not expressly state that he had disagreed with the verdict or state the offence of which, in his opinion, the accused was guilty or that a reference was necessary for the ends of justice.¹⁶⁹ But it has also been held that a mere omission to state the offence which he considers to have been committed by the accused, will not entail a rejection of the reference.¹⁷⁰

11. Proceed to try him on the charge, under the provision of S. 310 Cr. P. Code, if any.—

The last portion of Sub. s (1) of S. 307 has been added by S. 81 of Act XVIII of 1923. See notes under the heading "*History of the Section*" ante. It is supplementary to the remodelled S. 310 substituted for the old one by S. 83 of Act XVIII of 1923.

The Madras High Court had held, under the old S. 310 and Sub. s. (2) of S. 307, that an accused person, whose case the Judge intended to submit under S. 307, could not be asked to plead to a charge of a previous conviction, and that it would be only after he had been found guilty by the High Court, when the High Court could direct the Judge to take the plea and evidence, if necessary, and certify them (S. 428), and then pass judgment. This procedure was cumbrous and an amendment was suggested.¹⁷¹ Hence the present amendment. Under the new provision the Judge shall proceed to try him on the charge of previous conviction, as if such verdict had been one of conviction. The question of proof of previous conviction is one of fact which ought to go to the Jury, and must be determined by the Jury.¹⁷² With this proof, the whole record is submitted to the High Court, and the High Court can now, if it convicts the accused, forthwith pass the proper sentence on him.

12. The Judge shall not record judgment of acquittal or of conviction on any of the charges tried.—Sub-s. (2).—

The Judge must refer the entire case for consideration by the High Court; he must not enter his finding on any of the charges.¹⁷³ He cannot make the reference in part; he must refer the whole case.¹⁷⁴ If the Judge disagrees with the verdict on all or any of the

168. Lal Mohammad (1929) 11 P. L. T. 452 : 30 Cr. L. J. 1114 : A. I. R. 1930 P. 174 : 119 I. C. 898.

169. Irya (1904) 6 Bom. L. R. 599 : 1 Cr. L. J. 743 ; Rajeshwar (1905) 9 C. W. N. lxvi ; Chandra Krishna (1908) 10 Bom. L. R. 173 : 7 Cr. L. J. 192 ; Taribullah (1921) 25 C. W. N. 682 : 23 Cr. L. J. 244 : 66 I. C. 180.

170. Panchanon (1932) 37 C. W. N. 341 ; 34

Cr. L. J. 608 : A. I. R. 1933 C. 404 : 143 I. C. 600.

171. Kandasami (1906) 30 M. 134 : 5 Cr. L. J. 422.

172. Esan (1874) 21 W. R. 40.

173. Ekabbor (1925) 27 Cr. L. J. 617 : A. I. R. 1926 C. 925 : 94 I. C. 361.

174. Nawal Behari (1930) 52 A. 881 : 32 Cr. L. J. 81 : A. I. R. 1930 A. 489 : 128 I. C. 2,

charges, he must submit the *case*, the whole case, and not merely the matter of the individual charge as to which there is disagreement between him and the Jury. Thus, where the accused was charged under Ss. 302 and 326 I. P. C., and the Jury returned a verdict of 'not guilty' under the former, and a verdict of 'guilty' under the latter Section, it is not open to the Judge to accept their verdict on the latter charge, record a conviction for it, express disagreement with their verdict on the former charge and then refer the case to the High Court; such a reference is incompetent.¹⁷⁵ He should not record an order of acquittal or conviction in respect of any of the charges even though he agrees with the verdict of the Jury in respect of some of the charges but disagrees in respect of other charges.¹⁷⁶ It is not open to a Court of Session to accept the verdict of the Jury on one charge and disagree with them on another charge and refer the matter to the High Court.¹⁷⁷

S. 307 contemplates only a case in which, without recording any order of acquittal or conviction, the *whole case* is referred, including the verdict agreed in by the Judge.¹⁷⁸ The Legislature has given effect to the view expressed by Macpherson, J., in *Q v. Udaya Changa* (1873) 20 W.R. 73 noted below, which was a decision under the old Code of 1872, which originally contained no such provision. There the Judge agreeing with the verdict of the Jury on the first three charges recorded a formal order acquitting and discharging the prisoners. He disagreed with the verdict of the majority of the Jurors on the 4th charge acquitting the prisoners and referred the case to the High Court. Macpherson, J., observed: "Under S. 263 the case being once before the High Court, the Court may convict the accused person on the facts, and may pass such sentence as might have been passed by the Court of Session. But this Section does not appear to me to contemplate such a thing as that when the Sessions Judge has approved of a verdict on certain charges and formally acquitted and discharged the accused as to these charges, the High Court, should, on the facts, convict on those very charges. It seems to contemplate only a case in which, without recording any order of acquittal or conviction, the Sessions Judge refers the whole case." And the learned Judge further added: "Even supposing, however, that this Court in strictness has power to interfere as regards the charges on which the accused has been acquitted by both Judge and Jury, I should decline to exercise such a power in the face of the unanimous verdict of a Jury, concurred in by the Sessions Judge, whether that verdict appeared to me to be wrong or not." The Amendment of 1874 [See Notes under heading *History of the Section, ante*] has made the point clear and it has enacted that the Judge *shall not* record judgment of acquittal or of conviction on any of the charges on which the accused has been tried. Recording of judgment is an act of the Judge subsequent to his acceptance of the verdict (See S. 306). So, until the judgment is

175. Hazari Lal (1931) 11 P. 395 : 33 Cr. L. J. 505 : A. I. R. 1932 P. 156 : 137 I. C. 190 [relying on Ananda (1916) 21 C. W. N. 435 : 18 Cr. L. J. 551 : 39 I. C. 695].

176. Bishnu (1933) 37 C. W. N. 1180 (S. B.) : 34 Cr. L. J. 918 : A. I. R. 1933 C. 665 : 145 I. C. 236.

177. Ramjanam (1935) 14 P. 717 : 36 Cr. L. J. 856 : A. I. R. 1935 P. 357 : 155 I. C. 866.

178. Deodhar (1900) 27 C. 144, 148. *See also* Udaya Changa (1873) 20 W. R. 73.

recorded, the verdict has no effect even if he agrees with it. When the case is referred for disagreement with the verdict on some other charges, mere acceptance of the verdict on other charges cannot bind the High Court, for no judgment was recorded on those charges ; the High Court is free to pass any judgment it thinks proper as regards them. The whole case is thus open to the High Court. So there cannot be a limited reference under S. 307. If the Judge does record a judgment of acquittal or of conviction in the face of the positive prohibition enacted in Sub-s. (2), it cannot, it is submitted, have any binding effect on the High Court which may come to an opposite conclusion. It is one thing to say that the High Court *should* not interfere, as was said by Macpherson, J., and a different thing to say that it *cannot*. In one case, two accused were charged under S. 302 I. P. C., for causing the death of a person by poisoning. One was acquitted by the Jury under the Judge's direction. Jury also gave a verdict of not guilty in respect of the other accused to which the Judge did not agree and referred his case to the High Court. The High Court, while hearing the reference, found misdirection and after giving notice to the first accused who was acquitted (and who was no party to the reference) to show cause why the order of acquittal should not be set aside, directed a re-trial of both the accused (See *Q. E. v. Daula Ana*, 15 B. 452, 455). Similarly if the Judge agreeing with the Jury illegally records a judgment of acquittal in respect of one of the charges against an accused, but disagreeing with the verdict in respect of the other charge or charges refers the matter to the High Court, the High Court has, it is submitted, the power to set aside that order of acquittal and pass proper orders on the reference.

13. Limited Reference.—

A limited form of reference, however, has been accepted in some cases. Thus, where the accused was tried on several charges and the Sessions Judge accepted the verdict of the Jury as to some and disagreed as to the others and referred the verdict to the High Court as to these latter : *Held*, that by this limited form of reference the High Court was precluded from considering the entire evidence on the record, and on such reference all that the High Court had to decide was, whether the verdict of the Jury on the charges, as to which there was disagreement between the Judge and the Jury, was a reasonable verdict which a body of reasonable men could arrive at having regard to the evidence bearing on these charges ; that the Sessions Judge, if he considered that the interests of justice required a reference to the High Court, should have referred the whole case leaving it to the High Court to consider the whole of the evidence that was placed before the Jury.¹⁷⁹ Of the five accused persons, the Jury unanimously found one guilty under S. 304 I. P. C., and the Judge agreeing with that verdict sentenced him to transportation for life. The other four accused persons were charged under Ss. 148, 304/149, 326/149 I. P. C., there being no charge under S. 326 I. P. C. The Jury unanimously acquitted them of the charge of rioting, and the Judge agreed with them, but the Jury found them guilty under S. 326 I. P. C. The Judge made a reference under S. 307 Cr. P. C., on the ground that the verdict under S. 326 I. P. C., was illegal and unwarranted by the evidence and should be altered to one under S. 326/149 I. P. C. *Held*, that,

179. Ananda (1916) 21 C. W. N. 435 : 18 Cr. L. J. 551 : 39 I. C. 695.

on the reference, the High Court could not consider the question of rioting in respect of which the Judge and the Jury were agreed, *a fortiori* it could not consider any charge made by implication under S. 149; that the verdict of the Jury under S. 326 was illegal and must be set aside.¹⁸⁰ Accused was tried on charges under Ss. 302 and 302/34 I. P. C., the facts being that the deceased was killed by a fatal blow given by one of two persons, viz, the accused and another undiscovered person who was then with him; and the Jury held that the accused was not the person who dealt the fatal blow and also there was a doubt whether the accused was even guilty under S. 302 read with S. 34. The Sessions Judge accepted the verdict of not guilty under S. 302, though his own view was that the accused was the person who dealt the fatal blow, because he was not able to say that the Jury's doubt on that matter was unreasonable. He disagreed with the verdict on the charge under Ss. 302/34 and referred the case to the High Court. It was held that the High Court ought not to re-open the enquiry whether the accused was not the person who really struck the fatal blow.¹⁸¹ In one case, where the Judge agreed with the verdict under S. 343 I. P. C., and referred the verdict on the other charges, the High Court said that the former was not before it and left it to the Judge to pass sentence thereon.¹⁸² It should be noticed that in the case of *K. E. v. Madan Mandal*, cited above, the High Court said that if the Judge agreed with the verdict on some charge he can make no reference in respect of it; and in *E. v. Profulla*, cited above, the High Court only *condemned the practice* of sending up limited references, and said that it would be *better* if he referred the whole case, leaving the High Court to consider the entire evidence instead of dividing up the verdict and accepting part and disagreeing with part. Where the whole case is referred on disagreement as to some of the charges, the High Court may convict even on a charge on which the unanimous verdict of not guilty was accepted by the Sessions Judge.¹⁸³

Under S. 307 (2) the Judge should not enter a finding on any of the charges, but should refer the entire case for the consideration of the High Court.¹⁸⁴

14. The High Court may exercise any of the powers which it may exercise in appeal.—Sub-s. (3).—

The powers of an Appellate Court are defined in S. 423. They are :—

(a) power to set aside an order of acquittal, and to direct that further enquiry be made or that the accused be retried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law.

(b) (1) power to reverse the finding and sentence, and acquit or discharge the accused, or order him to be retried by a Court of competent jurisdiction subordinate to such Appellate

180. *Madan* (1913) 41 C. 662 : 18 C. W. N. 668 : 15 Cr. L. J. 155 : 22 I. C. 731.

181. *Profulla* (1922) 50 C. 41 : 24 Cr. L. J. 763 : A. I. R. 1923 C. 453 : 74 I. C. 267.

182. *Lyall* (1901) 29 C. 128 : 6 C. W. N. 253.

183. *Dwarika Nath* (1932) 60 C. 427 : 37 C. W. N. 91 : 34 Cr. L. J. 164 : A. I. R. 1933 C. 47 : 141 I. C. 578.

184. *Ekabbor* (1925) 27 Cr. L. J. 617 : A. I. R. 1926 C. 925 : 94 I. C. 361.

Court or committed for trial ; or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence ; or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but, subject to the provision of S. 106 (3), not so as to enhance the same.

(c) In an appeal from any other order, power to alter or reverse such order.

(d) power to make any amendment or any consequential or incidental order that may be just or proper.

Under S. 428, the Appellate Court has the power to take additional evidence if it thinks it necessary. So in a reference under S. 307, the High Court can call for or take further evidence.¹⁸⁵

As there can be no record of acquittal or conviction under Sub s. (2) of S. 307, the wordings of S. 423 cannot properly apply to a reference under S. 307. It would have been better if S. 307 itself specifically mentioned the powers which the High Court could exercise on such a reference. The general power to acquit or convict is given by that Section itself, but this general power has been made subject to any other power which an Appellate Court may exercise. Therefore, the High Court, instead of acquitting or convicting, may order re-trial or before acquitting or convicting may take additional evidence. Obviously, the other powers of an Appellate Court, such as the power to order further enquiry or committal for trial, cannot possibly be exercised in a reference under S. 307. The High Court may also, under S. 106 (3), take security from the convicted accused for keeping the peace. It may also make any consequential or incidental order that may be just or proper.

A case coming before the High Court under S. 307 is not heard by that Court in its Original Criminal Jurisdiction but as a Court of Reference in exercise of its powers under S. 28 of the Letters Patent which are co-extensive with its Appellate Jurisdiction. The proceedings before the Division Bench cannot be considered a trial *de novo* by the High Court.¹⁸⁶

No appeal lies to the High Court from its own judgment passed under S. 307 Cr. P. Code.¹⁸⁷

Under the Code of 1872, it was held that the High Court had no power to order a re-trial on a reference under S. 263.¹⁸⁸ Under the Code of 1882, S. 307, it was held that the High Court had such power.¹⁸⁹ It has recently been held that the High Court has ample power in a case in which there had been no proper or adequate trial, to make an order that the accused person should be re-tried.¹⁹⁰ The Madras High Court in a Full Bench decision

185. Debendra (1929) 56 C. 566 : 33 C. W. N. 632 : 50 C. L. J. 1 : 30 Cr. L. J. 1031 : A.I.R. 1929 C. 244 : 119 I. C. 378.

186. In the matter of Horace Lyall (1901) 29 C. 286 (F. B.) : 6 C. W. N. 254.

187. Adveppa (1894) Rat. 691.

188. Mukhun (1877) I. C. L. R. 275, 282, 287.

189. Rupya (1885) Rat. 245, 252 See also Dada Ana (1890) 15 B. 452, 458.

190. Rafiqueuddin (1934) 62 C. 572 (S. B.) : 39 C. W. N. 368 : 36 Cr. L. J. 808 : A. I. R. 1935 C. 184 : 155 I. A. 687.

in *Veerappa Goundan v. E.*¹⁹¹ said,—“The duty of the High Court is discharged in a reference by a Sessions Judge when it expresses its agreement or disagreement with the view of the Sessions Judge that the verdict was one which reasonable men could not have arrived at on the evidence before them ;” and again,—“It is not for us to interfere unless the verdict is unreasonable.” On these observations Wallace, J. in *In re Muttaya Pillai*¹⁹² has remarked,—“I feel constrained to point out that on a reference under S. 307 it is the High Court which records the conviction and passes the sentence, and the accused has, therefore, no right of appeal as from a Sessions Judge to the High Court. The reference, in fact, takes away the right of appeal he would otherwise have to the High Court. The decision of the Full Bench which precludes the High Court from interfering, even to order a re-trial, except when it regards the verdict as unreasonable, therefore precludes this Court from considering whether there were in fact misdirections vitiating the verdict, although, if there had been no reference, the accused would have been able to come up on appeal and plead such misdirection. I would respectfully suggest that the view of the Full Bench would require some reconsideration in the light of this difficulty.” A Full Bench of the Allahabad High Court has held that where a Jury has given its verdict on the facts of the case, it is open to the High Court to revise that verdict on a reference under S. 307, even in cases where it is not alleged that there has been any misdirection by the Judge or any misunderstanding by the Jury of the law as laid down by the Judge.¹⁹³

S. 307 makes no distinction between cases of acquittal and conviction. In either cases the Court has only to see that there was evidence on which the Jury could properly acquit or convict ; in each case the verdict must have been perverse before the High Court can interfere. But in dealing with the weight and volume of evidence the cases differ, because of the presumption of innocence. When a Jury has convicted, the Court has to see not merely that there is evidence of guilt but that the evidence is strong enough to preclude a reasonable doubt in the minds of the Jury as to the guilt of the accused.¹⁹⁴ The High Court may, after giving due weight to the opinion of the Judge and Jury, substitute a verdict of guilty for one of acquittal.¹⁹⁵

Where the accused in one speech committed two offences under Ss. 121 and 124 A I. P. C., and was convicted under S. 124A I. P. C., the High Court on reference can set aside the sentence and impose a fresh sentence under S. 121 I. P. C.¹⁹⁶

191. *In re Veerappa* (1928) 51 M. 956 (F. B.) : 30 Cr. L. J. 317 : A. I. R. 1928 M. 1186 : 114 I. C. 353.

192. *In re Muttaya Pillai* (1928) 56 M. L. J. 103 : 30 Cr. L. J. 843 : A. I. R. 1929 M. 135 : 117 I. C. 787.

193. *Shera* (1928) 50 A. 625 (F. B.) : 29 Cr. L. J. 353 : A. I. R. 1928 A. 207 : 108 I. C. 225.

194. *Dagadu* (1932) 35 Bom. L. R. 183 : 34 Cr.

L. J. 660 : A. I. R. 1933 B. 144 : 143 I. C. 495.

195. *Dwarika Nath* (1932) 60 C. 427 : 37 C. W. N. 91 : 34 Cr. L. J. 164 : A. I. R. 1933 C. 47 : 141 I. C. 578.

196. *Hasrat Mohani* (1922) 24 Bom. L. R. 885 : 24 Cr. L. J. 923 : A. I. R. 1922 B. 284 : 75 I. C. 299.

15. "Subject thereto."—

The words "subject thereto" do not destroy or over-ride the other provisions of Section 307. That Section deals with the creation of a power independent altogether from the function of an Appellate Court.¹⁹⁷

16. Procedure on the hearing of Reference.—

On the question whether the accused person should have notice of any action proposed to be taken by the High Court under S. 263 of Act X of 1872 (now S. 307) the High Court entertained some doubt whether the law requires such notice, but considered that it would be fair to him that notice should be given and that he should have time to bring forward any objection that he may have to the Sessions Judge's recommendation.¹⁹⁸ This case is no longer of any importance because there are specific provisions made in the Code for notice on the accused person as regards appeals and revisions, and on general principles no order can be made to the prejudice of anybody without giving him an opportunity to be heard.

In a case in which the Government ask for conviction against the verdict of the Jury, it is for the Government to begin and satisfy the Court that there is a case calling upon the prisoner to answer.¹⁹⁹

In some cases it was held that where the Crown begins it has no right of reply,²⁰⁰ but this procedure seems to be not justified.

If the Judges differ in opinion, the procedure laid down in S. 429 Cr. P. C., should be followed and the case should be referred to a third Judge.²⁰¹ Where the case is referred to a third Judge, the fact that one Judge accepted the verdict is very important in deciding whether the verdict should be set aside; and it should not be set aside unless in a clear case.²⁰²

17. Meaning of the word 'opinion'.—

'Opinion' of the Judge is his opinion on the merits of the case and does not include his speculations as to what external considerations, if any, might have affected the judgment of the Jury.²⁰³ (See notes under the heading "*Recording the grounds of his opinion, ante*").

197. See *Sharma* (1928) 51 A. 625 (F. B.); 29 Cr. L. J. 353; A. I. R. 1928 A. F. 207; 108 I. C. 225; and *Rafiqueuddin* (1934) 62 C. 572 (S. B.); 39 C. W. N. 368; 36 Cr. L. J. 808; A. I. R. 1935 C. 184; 155 I. C. 687.

198. *Ostium* (1873) 19 W. R. 38.

199. *Ram Churn* (1873) 20 W. R. 33.

200. See *Annada* (1909) 36 C. 629; 13 C. W. N. 757, 758; 9 C. L. J. 638; 10 Cr. L. J. 32; 2 I. C. 497.

201. *Purna Hazra* (1905) 2 C. L. J. 77 (n); *Dada Ana* (1890) 15 B. 452.

202. *Yunus Ali* (1928) 32 C. W. N. 783; 30 Cr. L. J. 82; 117 I. C. 680.

203. *Dhananjay* (1923) 51 C. 347; 38 C. L. J. 384; 25 Cr. L. J. 758; A. I. R. 1924 C. 321; 81 I. C. 246; *Mamfru* (1923) 51 C. 418; 38 C. L. J. 397; 25 Cr. L. J. 775; A. I. R. 1924 C. 323; 81 I. C. 264.

The expression "opinions of the Sessions Judge and of the Jury" in S. 307 (3) is equivalent to "opinion of the Sessions Judge and the verdict of the Jury."²⁰⁴ Where the verdict is clear and unambiguous, as a verdict of "not guilty", the Sessions Judge is not competent to ask the jurors questions to obtain their opinions on some portions of the evidence, so that he may determine whether he should report the case to the High Court.²⁰⁵ There is nothing in Cl. (3) of S. 307 warranting the interpretation of the term 'opinion' in it to mean other than the respective conclusions of the Jury and of the Judge, and the term is not used there to denote the reasons for such decision.²⁰⁶ A reference under S. 307 is not rendered invalid by reason of the Sessions Judge having asked reasons for their verdict, though S. 303 of the Code does not authorize the Sessions Judge to put questions to the Jury as to the reasons for their opinion.²⁰⁷ (See notes under the heading "Questioning for purposes of specific findings," in Ch. VIII of Part II, *ante*.)

On the other hand, it has been held that the Legislature, in directing that the High Court should duly weigh the opinion of the Jury, gives an implied authority for the recording of the reasons for their opinion by the Sessions Judge; the absence of the reasons of the Jury for their verdict only enhances the High Court's responsibility in the matter and requires it to go into the evidence most carefully.²⁰⁸ (This case, however, has not been followed in a later case of the Patna High Court, *E. v. Hyder Ali*, noted above). Where a Judge disagrees with the verdict of a Jury and proposes to submit the case to the High Court, it is very desirable that the Judge should ask for specific findings on the particular facts on which he himself relies; a bare verdict of 'not guilty' may be as consistent with a belief of a great part of the evidence for the prosecution as with a total disbelief of every part of it.²⁰⁹ The Judge has power, after deciding to refer the case, to inform the Jury of the fact and ascertain their reasons for the verdict for the High Court's guidance.²¹⁰ A Judge asked the Jury the question, "What are your reasons for your

204. *Tara Pada* (1913) 18 C. W. N. 615 : 18 C.L.J. 522 : 15 Cr. L. J. 31 : 22 I. C. 175 ; *Dhananjay* (1923) 51 C. 347 : 38 C. L. J. 384 : 25 Cr. L. J. 758 : A. I. R. 1924 C. 321 : 81 I. C. 246 ; *Chejlan* (1905) 29 M. 91 : 3 Cr. L. J. 371 ; *Ali Hyder* (1923) 4 P. L. T. 425 : 26 Cr. L. J. 856 : A. I. R. 1923 P. 474 : 86 I. C. 712.

205. *Abdul Hamed* (1905) 32 C. 759 : 9 C. W. N. 520 : 2 Cr. L. J. 259 : *Sadek* (1933) 61 C. 256 (S. B.) : 38 C. W. N. 254 : 35 Cr. L. J. 496 : A. I. R. 1934 C. 173 : 147 I. C. 860.

206. *Chellan* (1905) 29 M. 91 : 3 Cr. L. J. 371.

207. *In re Subbiah* (1920) 43 M. 744 : 21 Cr. L. J. 466 : 56 I. C. 498, *per* Sadasiva Aiyar J. ; *In re Seranadu* (1907) 17 M. L. J. 476 : 6 Cr. L. J. 373.

208. *Bhuirotan* (1921) 2 P. L. T. 655 : 23 Cr. L. J. 11 : 64 I. C. 379 ; *Punit Chain* (1922) 1922

P. 218 : 23 Cr. L. J. 421 : A. I. R. 1922 P. 348 : 67 I. C. 581.

209. *In re Pamanna* (1884) 2 Weir 388.

210. *Sadek* (1933) 61 C. 256 (S. B.) : 38 C. W. N. 254 : 35 Cr. L. J. 496 : A. I. R. 1934 C. 173 : 147 I. C. 860 ; *Annada* (1909) 36 C. 629 : 13 C. W. N. 757 : 9 C. L. J. 638 : 10 Cr. L. J. 32 : 2 I. C. 497 ; *Nishikanta* (1924) 41 C. L. J. 35, 44 : 26 Cr. L. J. 805 : A. I. R. 1925 C. 525 : 86 I. C. 453 ; *Kankaya* (1926) 22 N. L. R. 42 : 27 Cr. L. J. 773 : A. I. R. 1926 N. 308 : 95 I. C. 309 ; *Tukaram* (1928) 30 Cr. L. J. 310 : A. I. R. 1929 N. 84 : 114 I. C. 453 ; *Baliram* (1932) 15 N. L. J. 116 : 34 Cr. L. J. 411 : 142 I. C. 785 ; *Musst. Zohra* (1919) 1 P. L. T. 657 : 21 Cr. L. J. 278 : 55 I. C. 294 : *Punit Chain* (1922) 1922 P. 218 : 23 Cr. L. J. 421 : A. I. R. 1922 P. 348 : 67 I. C.

verdict ?" The answer they gave was, "We give him the benefit of the doubt, we can give no other reason." If the learned Judge wanted to ascertain from the Jury their reasons for the verdict they had brought in, it would have been better if he had put to them specific questions with regard to the issues of fact arising in the case and also to the evidence of particular witnesses. It is no good asking the Jury to give their reasons. Even trained intellects often find it difficult to formulate and put before the Court reasons for an opinion which they hold or which they wish to propound. The Judge should ask the Jury as to what view they took of particular facts and also of the evidence of particular witnesses.²¹¹ Where the Jury returned a unanimous verdict of not guilty to the effect that they would give the accused the benefit of the doubt, and thereupon the Judge questioned the Jury, "On what point you feel doubt," and made a reference under S. 307 on the basis of the answer he got : *Held*, that the procedure had no warrant in law and was wholly unconstitutional.²¹² The reasons given by the foreman may not always be exhaustive.²¹³

18. Assessment of weight of Verdict.—

An unanimous verdict carries great weight.²¹⁴ Preference is given to unanimous verdicts ; the weight diminishes when the verdict not unanimous.²¹⁵ "Except under strong circumstances when the facts of the case cause one to disturb it, or when there is obvious misapprehension of law applicable to the facts, I am strongly opposed to touching the unanimous decision of a tribunal appointed by law to determine the guilt or innocence of accused persons, and I do myself, and as far as I am aware my brother Judges also, religiously recognize this principle."²¹⁶ Little or no weight attaches to the verdict of a bare majority, dissented from by the Judge ; for the opinion of the minority coupled with the opinion of the Judge neutralizes the opposite opinion of the so called majority.²¹⁷

19. Unreasonable Verdicts.—

Must be set aside by the High Court, as for instance where, in a case of murder, blood-stained ornaments were found in the room occupied by the accused and the

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| 581 ; Turner (1915) 16 Cr. L. J. 587 : 30 I. C. 139 (Punj.) | Carthy (1887) 9 A. 420 : 7 A. W. N. 39. |
| 211. Nishi Kanta (1924) 41 C. L. J. 35, 44 : 26 Cr. L. J. 805 : A. I. R. 1925 C. 525 : 86 I. C. 453. | 215. Dhananjay (1923) 51 C. 347, 353 : 38 C. L. J. 384 : 25 Cr. L. J. 758 : A. I. R. 1924 C. 321 : 81 I. C. 246. |
| 212. Bhukhan (1929) 11 P. L. T. 605 : 31 Cr. L. J. 54 : A. I. R. 1930 P. 208 : 120 I. C. 290 ; Ramjag (1927) 7 P. 55 : 29 Cr. L. J. 466 : A. I. R. 1928 P. 203 : 109 I. C. 114. | 216. <i>Per</i> Straight, J, in <i>Mc. Carthy</i> (1837) 9 A. 420 : 7 A. W. N. 39. <i>See also</i> <i>Pramatha</i> (1919) 30 C. L. J. 503 : 21 Cr. L. J. 266 : 55 I. C. 282 ; <i>Sagarmal</i> (1924) 28 C. W. N. 947 : 40 C. L. J. 135 : 25 Cr. L. J. 1217 : A. I. R. 1924 C. 960 : 82 I. C. 145. |
| 213. Chhanoo (1918) 22 C. W. N. 1028 : 20 Cr. L. J. 223 : 49 I. C. 783. | 217. <i>Mukhun</i> (1877) 1 C. L. R. 275 ; <i>Mc. Carthy</i> (1887) 9 A. 420 : 7 A. W. N. 39. |
| 214. <i>Yakub</i> (1925) 30 C. W. N. 859 : 27 Cr. L. J. 1341 : A. I. R. 1926 C. 1034 : 98 I. C. 413 ; <i>Mukhun</i> (1877) 1 C. L. R. 275, 282 ; <i>Mc.</i> | |

evidence established that those articles belonged to the deceased ;²¹⁸ when the accused was caught almost red-handed, and the acquittal was due to the absence of eye-witnesses ;²¹⁹ where the Jury entirely overlooked the direct evidence and did not appreciate the cumulative effect of the evidence ;²²⁰ where the verdict was due to sentiment in the face of overwhelming evidence ;²²¹ where the verdict was not supported by evidence ;²²² where the verdict of acquittal was against the entire weight of the evidence on record and there was no evidence or circumstance in the facts of the case which could create a reasonable doubt about the guilt of the accused.²²³

20. Verdicts induced by Judge's mistake or misdirection.—

In a case of dacoity, the Judge took a wrong view in impressing upon the Jury that the evidence as to the abstraction of the ring from the complainant's finger was not to be believed, and that a charge of dacoity was, therefore, not sustainable. The High Court did not see any reason to distrust the evidence on that point and then observed : "By the Judge's expressing his opinion as to the untrustworthiness of a portion of the evidence of three material witnesses, he needlessly, according to our view, put an impediment in the way of the Jury, who could not well be blamed for extending their disbelief to the entire testimony of those witnesses. This disbelief would justify their verdict, but that verdict, which would under ordinary circumstances have been a perverse one, is none the less a means of defeating justice, because it was induced wholly or in part by a wrong suggestion on the part of the Judge. The acquittal, therefore, is not to be set aside, the less because the Judge and the Jury have both committed a mistake."²²⁴

But it has also been held that on a charge on which the Judge and the Jury have agreed although the verdict of the Jury may have been based on a misdirection, the High Court will not interfere. The accused were tried on charges under Ss. 148, 304/149, 326/149 I. P. C. The Jury unanimously acquitted them of the charge of rioting to which the Judge agreed, but found them guilty under S. 326 I. P. C. The Judge referred the case to the High Court, stating that the conviction under S. 326 was illegal, there being no charge on it and it should be altered to S. 326/149. *Held*, that the High Court could not consider the question of rioting in respect of which the Judge and the Jury were agreed, although the verdict of the Jury acquitting the accused of the charge of rioting was based on a misdirection by the Judge.²²⁵

See in this connection the cases of *Veerappa Goundan v. E.*²²⁶ and *Shera v. E.*²²⁷

218. Sheikh Neamatulla (1913) 17 C. W. N. 1077 : 14 Cr. L. J. 556 : 21 I. C. 156.

219. Kandasami (1906) 30 M. 134 : 5 Cr. L. J. 422.

220. Sagarmal (1924) 28 C. W. N. 947 : 40 C. L. J. 135 : 25 Cr. L. J. 1217 : A. I. R. 1924 C. 960 : 82 I. C. 145.

221. Akhileshwari (1925) 4 P. 646 : 26 Cr. L. J. 1441 : A. I. R. 1925 P. 772 : 89 I. C. 961.

222. Gobind Singh (1926) 5 P. 573 : 27 Cr. L. J. 1308 : A. I. R. 1936 P. 535 : 98 I. C. 252.

223. Ram Dass (1932) 9 A. W. N. 301 : 33 Cr. L. J. 465 : 137 I. C. 346.

224. Khanderav (1875) 1 B. 10.

225. Madan (1913) 41 C. 662 : 18 C. W. N. 668 : 15 Cr. L. J. 155 : 22 I. C. 731.

226. (1928) 51 M. 956 (F. B.) : 30 Cr. L. J. 317 : A. I. R. 1928 M. 1186 : 114 I. C. 353.

227. (1928) 50 A. 625 (F. B.) : 29 Cr. L. J. 353 : A. I. R. 1928 A. 207 : 108 I. C. 225.

noted under the heading "*The High Court may exercise any of the powers which it may exercise on appeal*", *ante*.

21. Benefit of the doubt.—

Where the case was suspicious and the prosecution evidence very unsatisfactory, but still the Jury returned a unanimous verdict of guilty, the High Court interfered and gave the benefit of the doubt to the accused.²²⁸ Where it did not appear whether the verdict of the Jury was unanimous or not, and the Judge himself had not stated in his order that he considered the verdict to be perverse and all that was available was the opinion of the Judge that the accused was guilty and the opinion of the Jury he was not, and some not very convincing evidence which might or might not be believed : *Held*, that the benefit of doubt should go to the accused and that it was not a proper case for interference.²²⁹ The verdict of the Jury was based upon the ground that the inference of dacoity from the specific facts was not a necessary, although a highly probable, one : *Held*, that it is impossible to say that the verdict is not justified by the circumstances, and that the reference under S. 307 cannot be accepted.²³⁰

22. "Of any offence of which the Jury could have convicted him upon the charge framed and placed before it."—

(See notes under heading "*Verdict on offences not charged*" in Ch. VIII of Part II, *ante*.)

The above words may be said to have been taken from the judgment of Markby, J., in *E. v. Harai Mirdha*.²³¹ In this case two prisoners, together with four others, were tried by the Judge under Ss. 302/149 and 326/149. In the case of two of the prisoners the Jury returned a verdict of guilty under S. 326 I. P. C. Two others were found not guilty. Of the remaining two, the present prisoners, though also found not guilty of the charges framed, were found, by a majority of three out of five of the Jury, to have been present with the others ; but it was added that they went only for the purpose of rioting, which the Jury explained to mean "in order to punish the deceased to a certain extent, but not to go as far as to inflict grievous hurt on him". *Held*, that on the facts found by the Jury, they could have found the prisoners guilty under S. 143 I. P. C. ; the High Court on a reference under S. 263 (now 307) Cr. P. Code, has a right to convict a prisoner of any offence which the Jury could have convicted him of, upon the charge framed and placed before them. An offence under S. 365 I. P. C., is a minor offence as compared with offences under Ss. 366 and 376 I. P. C., and the High Court, in dealing with a case under S. 307 Cr. P. Code, can convict an accused of the former offence without a formal charge having been framed.²³² Where the charge was under S. 397 I. P. C., it was open to the Jury to convict

228. Yakub (1925) 30 C. W. N. 859 : 27 Cr. L. J. 1341 : A. I. R. 1926 C. 1034 : 98 I. C. 413 ;
Dagadu (1932) 35 Bom. L. R. 183 : 34 Cr. L. J. 660 : A. I. R. 1933 B. 144 : 143 I. C. 495.

229. Madan Gopal (1931) 1931 A. L. J. 695 : 32 Cr. L. J. 1028 : 133 I. C. 475.

230. Boyna Sanna (1933) 1934 M. W. N. 1438.

231. (1877) 3 C. 189.

232. Sitanath (1895) 22 C. 1006.

under S. 326 I. P. C., though the offence was only triable by assessors ; and the High Court, under S. 307, could convict under S. 326 I. P. C.²³³

The prisoner was tried on a charge under S. 413 I. P. C. There was no charge under S. 411 I. P. C. and the Jury could not have convicted him on that charge. The High Court cannot, therefore, on a reference under S. 307, convict him under S. 411 I. P. C.²³⁴ [In this case the High Court refused to order a re-trial on a charge under S. 411 I. P. C., because the prisoner had already been twice tried on a charge under S. 413 I. P. C.]. The prisoners were tried under Ss. 148, 304/149, and 326/149 I. P. C. The Jury acquitted them on those charges to which the Judge agreed, but found them guilty under S. 326 I. P. C., to which the Judge disagreed and referred the case to the High Court. *Held*, that there being no charge under S. 326 independently, there could be no verdict given upon it, and so it was illegal and void and must be set aside.²³⁵ The High Court cannot convict under a Section under which no charge was framed against the accused in the trial Court ; S. 34 I.P.C. does not create an offence, it merely lays down a rule of law.²³⁶

When the common object assigned in the charge as framed in a case under S. 147 I. P. C., has not been sustained, the High Court in a reference under S. 307 cannot invent another common object in order to support the conviction.²³⁷

The accused were committed to the Sessions, charged with having committed dacoity and murder in committing dacoity, Ss. 395 & 396 I. P. C., and some of them were also charged with having received some of the stolen property under S. 412 I. P. C. A perusal of the preliminary register would have shown that the accused were either guilty under S. 396 or not guilty of dacoity at all. S. 395 I. P. C., is triable by Jury, while S. 396 I. P. C., by assessors. The Session Judge under the impression that "the accused had to be convicted of dacoity by a Jury before S. 396 came into operation," empanelled a Jury and left it to them to say whether a dacoity had been committed or not. The Jury found the accused not guilty of dacoity. The Judge disagreeing referred the case to the High Court. *Held*, (1) that the procedure adopted by the Judge was wrong and that he should have tried the accused with the aid of assessors under S. 396 ; (2) that if the circumstances had been such as to afford ground for supposing that the accused might be guilty of dacoity under S. 395 without being guilty also under S. 396, the Judge might have empanelled a Jury and, on the conclusion of the trial, he might have asked their opinion as assessors as to the guilt of the accused under S. 396 ; and that if he found them not guilty, he should then have charged the Jury with respect to the dacoity under S. 395, and should have taken their verdict thereon as a Jury ; (3) that the High Court could not tell the Judge to try the offence under S. 396 and to treat the Jury as assessors and their verdict as the opinion of assessors, and

233. *In re Muthiyalu* (1912) 37 M. 236 : 13 Cr. L.J. 739 : 17 I. C. 51.

234. *Baburam* (1891) 19 C. 190.

235. *Madan* (1913) 41 C. 662 : 18 C. W. N. 668 : 15 Cr. L. J. 155 : 22 I. C. 731.

236. *Profulla* (1922) 50 C. 41 : 24 Cr. L. J. 763 : A. I. R. 1923 C. 453 : 74 I. C. 267.

237. *Akbar Molla* (1923) 51 C. 271 : 38 C. L. J. 379 : 25 Cr. L. J. 773 : A. I. R. 1924 C. 449 : 81 I. C. 261.

then proceed with the trial as an assessor case, nor could they try the accused for an offence under S. 396 since that is not an "offence of which the Jury could have convicted him on the charge framed and placed before it;" but they might order a new trial by the Sessions Judge for the offence under S. 396, but that would be attended with obvious inconveniences and is not necessary for the ends of justice, as the High Court can, in the event of a conviction under S. 395 under the reference, impose a sentence adequate to the requirements of the case.²³⁸

23. Ss. 307 and 418.—Difference in the scope of enquiries.—

In the case of a reference by a Sessions Judge who differs from the verdict of acquittal by Jury, no doubt the High Court has to see whether the verdict of the Jury is perverse. But no such condition applies to S. 418 as amended by Act XVIII of 1923. No condition is imposed on the High Court in an appeal against acquittal by a Judge trying the case with assessors. All that the High Court has to see is whether the offence charged is proved against each of the accused.²³⁹ Where the acquittal has been by a Judge trying the case with a Jury, the appeal can lie on a matter of law only (S. 418) ; and the High Court has no power to interfere, however absurd or wrong the verdict might have been, when there has been no misdirection by the Judge and there is evidence against the prisoners for the jurymen to believe.²⁴⁰

238. Anga Valayan (1898) 22 M. 15 : 2 Weir 705.

239. Sheo Dayal (1933) 55 A. 689 : 35 Cr. L.J. 360 :
A. I. R. 1933 A. 535 : 147 I. C. 15.

240. Chinna (1890) 14 M. 36 : 2 Weir 390.

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